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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

19 CR 696 (PAE)

5 ARI TEMAN,

6 Defendant.

JURY TRIAL

7 -----x

8 New York, N.Y.
9 January 21, 2020
9:00 a.m.

10 Before:

11 HON. PAUL A. ENGELMAYER,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN,

16 United States Attorney for the
Southern District of New York

17 KEDAR S. BHATIA

EDWARD A. IMPERATORE

18 Assistant United States Attorneys

19 JOSEPH A. DIRUZZO, III

JUSTIN GELFAND

20 Attorneys for Defendant

21 ALSO PRESENT: DANIEL ALESSANDRINO, NYPD

WILLIAM MAGLIOCCO, Paralegal, USAO

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(Case called)

MR. BHATIA: Good morning, your Honor.

Kedar Bhatia and Edward Imperatore, for the United States.

We're joined at counsel table by Detective Daniel Alessandrino of the New York Police Department, and Paralegal Specialist William Magliocco of the U.S. Attorney's Office.

THE COURT: All right. Very good.

Good morning Mr. Bhatia; good morning, Mr. Imperatore; good morning, Mr. Magliocco; and good morning, Detective Alessandrino.

Did I get everyone's pronunciation correct?

Very good.

And for the defense.

MR. GELFAND: Good morning, your Honor.

Joseph DiRuzzo and Justin Gelfand on behalf of Mr. Teman, who is on bond and present in the courtroom.

THE COURT: All right. Very good.

Good morning, Mr. DiRuzzo; good morning, Mr. Gelfand; and good morning to you, Mr. Teman.

You may all be seated.

All right. I have a number of matters to take up before we have jury selection this morning. You should know that while I had anticipated that we might have a delay in jury selection because another case, a large case, was going to be

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1 picking a jury today, due to reasons specific to that case,
2 that case apparently is not going forward today. So my
3 expectation is that we are batting first, if you will, in terms
4 of what the jury clerk will do.

5 So it will be a little while. The jurors have to show
6 up; they need to be inculcated in the process of being a juror.

7 But once they are ready to dispense jurors to a court,
8 I think we come first. So hopefully we'll be making productive
9 use of time today.

10 All right. There are quite a number of things to take
11 up this morning. And I have a bench ruling which will address
12 both the proposed instructions that you gave me on the check
13 stub and the RCC issues; and will also resolve what are now two
14 additional, effectively, sets of motions *in limine* that I have
15 had letter briefed over the course of the week. I then have a
16 number of other issues I want to raise with you.

17 Before I embark on the bench ruling, let me just take
18 stock with counsel if there's anything that I need to be
19 attentive to today. Any issue you want to raise?

20 (Counsel conferred)

21 MR. BHATIA: Your Honor, you may have noticed in the
22 briefing on the motion to quash there is reference to a
23 subpoena to the defendant -- if-as-or-when subpoena to the
24 defendant. Previously we have --

25 THE COURT: This is a motion to quash the grand jury

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1 subpoena?

2 MR. BHATIA: That's right.

3 THE COURT: I'm ignoring that until after the trial.

4 MR. BHATIA: So what I wanted to say is I wanted to --
5 with leave of the Court, I'd like to give the defendant the
6 if-as-or-when subpoena that we were intending to serve on him
7 previously.

8 THE COURT: With respect to this trial.

9 MR. BHATIA: With respect to this trial.

10 THE COURT: You're welcome to do so, of course.

11 And to be clear, defense, while the grand jury
12 subpoena is something I will reserve resolution on until after
13 the trial, so that there's no doubt, the if-and-and-when
14 subpoena, if I've got that right, is a separate beast. That's
15 not being suspended. The obligations that attach to a
16 defendant's production of documents, when and if he testifies,
17 are not suspended merely because there's a separate grand jury
18 controversy afoot.

19 So take a look at that subpoena. I don't know whether
20 or not there are any issues I need to deal with; but understand
21 that it is a completely separate issue from the grand jury
22 matter that's been tabled.

23 MR. GELFAND: Your Honor, we appreciate that.

24 We do anticipate that there are completely separate
25 issues, in particular regarding the nature of the subpoena and

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1 what it requires of Mr. Teman, the defendant in this case.

2 With the permission of the Court, we'll do our best by
3 the end of today -- obviously not the court day, but by
4 midnight tonight -- to file anything that we believe is
5 appropriate. But I just wanted to raise that with the Court.

6 THE COURT: That's fine. I'm not going to resolve
7 anything without hearing your response. If you can get me
8 something tonight, that would be great.

9 I will need a copy, of course, of the subpoena that
10 was just hand-delivered by the AUSA to the defense. So why
11 don't you attach it to your letter.

12 MR. GELFAND: Yes, your Honor. Thank you.

13 THE COURT: All right. Very good.

14 Anything else to raise?

15 MR. BHATIA: Yes, your Honor.

16 Just regarding that subpoena, we'll provide a copy of
17 it to the Court today.

18 And in addition, I wanted to just note for the record
19 that we sent it electronically to defense counsel on January
20 12th to ask if they would accept service. We didn't hear
21 anything back. And then we saw on our -- their motion to quash
22 on Friday.

23 THE COURT: All right. Look, defense, just so that we
24 don't have any delays, while I appreciate that there may be
25 colorable objections to aspects of the subpoena, maybe the

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1 whole thing, be prepared, nevertheless, to produce in response
2 to it, so that if I disagree with whatever arguments you are
3 going to be making, we don't have a situation where we are
4 then -- only then engaged in document collection. Okay?

5 MR. GELFAND: Yes, your Honor.

6 THE COURT: All right.

7 Anything else to raise?

8 MR. BHATIA: Nothing else from the government.

9 MR. GELFAND: Not for the defense, your Honor.

10 THE COURT: All right.

11 Let me just quickly take care of a few discrete things
12 before getting into the bench decision.

13 First of all, I just want to make sure, I believe we
14 covered this at a prior conference, but the defense is not
15 making an advice of counsel defense in this case; correct?
16 There's been no notice of that and I haven't seen anything to
17 that effect.

18 (Counsel conferred)

19 MR. DiRUZZO: Your Honor, we are. And although --

20 THE COURT: When did you give notice of that?

21 MR. DiRUZZO: I don't believe that Rule 12.1, 2, or 3
22 requires advanced notice of an advice of counsel defense.

23 THE COURT: Tell me what the advice of counsel defense
24 consists of; in other words, who and what. I want to make sure
25 that there's -- I read through the government exhibit binder.

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1 There are a lot of documents where Mr. Teman has threatened
2 lawsuits and the like. I didn't see any reference to counsel.
3 I wasn't aware that there was an advice of counsel defense
4 here. Go ahead, tell me about it.

5 MR. DiRUZZO: Your Honor, in the documents the
6 government has produced in discovery, there's been emails from
7 a Mr. Ariel Reinitz, who works for the law firm -- is a partner
8 of the law firm of FisherBroyles. Mr. Reinitz is Mr. Teman's
9 attorney. And Mr. Reinitz is and has been intimately involved
10 with, among other things, the collection efforts of GateGuard's
11 to GateGuard's customers, including some of the customers that
12 are at issue in this case.

13 Does that answer your Honor's question?

14 THE COURT: And did you give notice to the government
15 that there was a potential advice of counsel defense here?

16 MR. DiRUZZO: No, your Honor. We didn't believe the
17 rules contemplate that. We believe that constitutionally we
18 are not required to do so.

19 THE COURT: All right.

20 And it's your expectation that Mr. -- give me the
21 spelling of that person's name?

22 MR. DiRUZZO: R-E-I-N-I-T-Z.

23 THE COURT: And is it your expectation that he may be
24 called as a witness on the defense case?

25 MR. GELFAND: Yes, your Honor. We anticipate calling

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1 him as a witness. I would also note that he was included on
2 the joint proposed witness list for the voir dire that was
3 submitted by the parties.

4 THE COURT: Okay. Government?

5 (Counsel conferred)

6 MR. BHATIA: Your Honor, we haven't received any
7 notice of an advice of counsel defense. I'll also note that I
8 don't believe there's any joint witness list in this case. We
9 submitted a list of the names and entities that might come up
10 during the course of trial. So we certainly haven't had notice
11 of calling an attorney as a defendant -- as a witness.

12 THE COURT: Was the defense obligated to do so?

13 (Counsel conferred)

14 MR. BHATIA: Your Honor, as an affirmative defense, we
15 do believe they are required to do so and they haven't provided
16 any notice of it. In addition, we've received Rule 16
17 discovery, but we haven't received any discovery involving
18 attorney-client communications between Mr. Teman and
19 Mr. Reinitz.

20 THE COURT: All right.

21 Look, obviously this is something that requires letter
22 briefing; so I would welcome a letter tonight from the
23 government with its views about the advice of counsel defense:

24 A, whether or not there was required notice; B, what,
25 if any, discovery at this stage is required of the defense; C,

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1 assuming that the witness is to go forward, what, if any,
2 discovery would later be provided.

3 I don't think I saw, defense, in your proposed jury
4 charge an instruction on the advice of counsel defense.

5 Was there one?

6 MR. GELFAND: There wasn't one.

7 THE COURT: Why was there not one?

8 MR. GELFAND: Because when the jury instructions were
9 due, we were, candidly, still receiving discovery from the
10 government. Within the past week, your Honor, we received
11 5,000 new pages from the government, and we were still making
12 strategic decisions.

13 THE COURT: I appreciate that.

14 But as you well know, when you submit proposed
15 charges, you are supposed to be inclusive, not exclusive. It
16 looks like that's an act of hiding the ball, when apparently
17 you were considering it all along and didn't include it in the
18 proposed jury charges.

19 MR. GELFAND: Your Honor, our intention certainly
20 wasn't to hide the ball.

21 The other thing I would note, and I would point the
22 Court's attention to a Second Circuit case called *Scully*, which
23 clearly and accurately states that advice of counsel is not an
24 affirmative defense in the criminal context; it's a way to
25 defeat or otherwise challenge the *mens rea*.

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1 THE COURT: I understand that. And I didn't take
2 Mr. Bhatia's characterization as an affirmative defense as
3 changing that fundamental principle. The issue is always
4 whether or not the government can establish beyond a reasonable
5 doubt the *mens rea* requirement of the statute. That's not the
6 point.

7 The issue here is whether notice was required of the
8 intention to call a -- to invoke that defense; and what, if
9 any, implications there are from the failure of the defense to
10 include an instruction along those lines in its request to
11 charge.

12 You were, I take it, at least considering such a
13 defense at the time you submitted the request to charge?

14 MR. GELFAND: Considering, yes. But given that that
15 obviously -- it comes with the possible arguments of waiver and
16 implied waiver, etc. We did not include an instruction. We
17 will submit a supplemental instruction for the Court's
18 consideration.

19 THE COURT: Yes, please do so tonight.

20 Look, I will wait for the government's letter as to
21 addressing this point, and I'll give you a brief opportunity to
22 respond. But as you can see, I, reading through the Rule 16
23 materials, immediately recognized that this case had at least
24 the potential to implicate advice of counsel issues, because
25 your client is repeatedly threatening legal action. I couldn't

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1 tell whether he's doing that on his own dime or with the advice
2 of counsel, but it leapt off the page as an obvious issue.

3 Government, have you asked the defense in writing or
4 orally whether it would be pursuing an advice of counsel
5 defense? I mean, it leaps off the page from the discovery you
6 have provided as a subject that a court would be curious about.
7 I assume you must have thought about this.

8 MR. BHATIA: No, your Honor, I don't believe -- I know
9 in our initial discovery letter we make certain requests. I
10 don't recall -- I don't believe that the advice of counsel was
11 one of those.

12 THE COURT: In your letter to me tonight, you should
13 concretely address whether or not the government explicitly or
14 implicitly has asked the defense about that subject. It may
15 well be that any obligation the defense had may have been only
16 in response to a question by the government. I don't know the
17 law in the area enough to opine confidently, but I expect a
18 comprehensive letter on this point.

19 I would also welcome each of your submitting the
20 proposed instruction as to advice of counsel along with your
21 letter.

22 So, government, get me a letter tonight.

23 Defense, get me a letter as quickly as possible
24 thereafter, but no later than tomorrow night. Okay?

25 MR. GELFAND: Yes, your Honor.

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1 THE COURT: All right.

2 Next. Just raising issues here.

3 It appears to me that Count One embraces checks from
4 three entities: Entities 1, 2, and 3.

5 Count Two embraces checks from two entities: Entities
6 3 and 4.

7 It strikes me as entirely likely that, at a minimum,
8 there will need to be an instruction with respect to unanimity,
9 lest there be a risk that six jurors convict as to Entity 1,
10 and six convict as a Entity 2, and there's no unanimity as to
11 any of them.

12 Beyond that, though, there is a substantial question
13 of whether or not the verdict form, which, as submitted by the
14 government and acquiesced then by the defense, simply answers
15 yes or no, guilty or not guilty, for each count, ought to take
16 account of the fact that the counts bundle together multiple
17 victims that may have multiple entities that may have different
18 narratives associated with them.

19 It seems to me there's a substantial argument here
20 that the verdict form ought to inquire more specifically of the
21 jury with respect to particular entities. I'd welcome each
22 side giving thought to that. I don't need to decide that now;
23 but, again, in preparing for today, that leapt out at me as a
24 relevant question.

25 All right. Government, you have moved to dismiss

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1 Counts Five and Six; is that correct?

2 MR. BHATIA: That's correct.

3 THE COURT: All right.

4 Defense, I take it, no objection?

5 MR. GELFAND: No objection.

6 THE COURT: All right. Then I will dismiss Counts
7 Five and Six on the government's motion.

8 All right. With that, I want to read aloud some bench
9 rulings to you.

10 All right. As before, there's not going to be a
11 written opinion. The rulings I'm about to make will be
12 reflected in the transcript here. And so if you need the text
13 of the ruling, you'll need to order the transcript.

14 I should ask, counsel, I assume you've ordered or plan
15 to order daily copy?

16 MR. BHATIA: That's right.

17 THE COURT: All right. Very good.

18 I will need that, because obviously it's likely to be
19 a relatively short trial. And when the jury goes out, if they
20 ask for excerpts of testimony, I want to make sure that we all
21 have the transcript handy so that you can very promptly search
22 the transcripts for responsive material.

23 All right. I have received, counsel, your joint
24 letter dated January 15th, docketed at Docket 80. That letter
25 sets out the parties' views as to potential instructions as to

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1 two discrete points. I had asked for your input as to these in
2 my bench ruling on January 10, resolving the various motions in
3 *limine*. Here is how I presently intend to address each
4 subject:

5 First, as to the check stock found in Teman's
6 possession at the time of his arrest, I asked counsel for "a
7 proper limiting instruction regarding the purposes for which
8 the jury may and may not consider the check stock seized from
9 Mr. Teman's office on July 3rd, 2019." That is a direct quote
10 from my bench opinion.

11 Counsel, what you submitted is not at all responsive
12 to what I asked you to do. You have, instead, agreed upon a
13 completely generic proposed instruction setting forth legal
14 principles governing similar act evidence in general which does
15 not refer at all to the check stock. With all respect, the
16 instruction you gave me is unhelpful for that purpose, it is
17 useless; indeed, it is arguably worse than unhelpful, because
18 it states to the jury at the outset, before setting out these
19 general generic principles, and I quote: "The government has
20 offered evidence tending to show that on another occasion, the
21 defendant engaged in conduct similar to the charges in the
22 indictment.

23 That statement is, to my knowledge, factually false.
24 I cannot imagine what the two of you were thinking or all four
25 of you were thinking about in asking me to tell the jury that.

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1 The government has not given Rule 404(b) notice, and
2 the Court has not been informed of any evidence that might be
3 offered at trial that Teman ever deposited or tried to deposit
4 unauthorized checks other than those charged. I do not know
5 what counsel were thinking in proposing that I tell the jury
6 that effectively there is such evidence.

7 To defense counsel in particular, I note that the
8 statement in the joint proposed instruction could affirmatively
9 harm your client in inaccurately implying that there has been
10 evidence at trial of his deposit of unauthorized checks other
11 than those charged in the indictment, or that the check stock
12 found in his office had been used to create other unauthorized
13 checks.

14 I have taken it upon myself to draft an alternative
15 instruction which I will read to you for your views. But,
16 counsel, I expect better of you and you need to do better when
17 the Court asks you for a proposed instruction. The instruction
18 you proposed was both nonresponsive and misleading.

19 With that, here goes as to the proposed instruction.

20 "You have heard testimony that at the time of the
21 defendant's arrest on July 3rd, 2019, blank check stock was
22 seized from his office. It is for you to decide whether or not
23 to credit this testimony. If you do, I want to instruct you as
24 to the strictly limited purposes for which you may consider
25 this check stock.

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1 "Specifically, you may consider this evidence to the
2 extent, if any, that you concluded it bears on the defendant's
3 knowledge; in particular, whether he had the knowledge and
4 capability to create the checks at issue in this case. You may
5 also consider this evidence to the extent, if any, that you
6 conclude that it bears on the defendant's intentions in
7 connection with respect to the use of the checks at issue in
8 this case.

9 "However, you may not consider the check stock found
10 in the defendant's office for any other purpose. Specifically,
11 you may not consider it as indicating that the defendant
12 engaged in any unlawful conduct other than that alleged in the
13 indictment. You may not consider this evidence as indicating
14 that the defendant had a criminal personality or a bad
15 character. This evidence instead was admitted for much more
16 limited purposes and you may consider it only for these
17 purposes."

18 Are there any objections to that instruction?

19 MR. DiRUZZO: No, your Honor.

20 MR. BHATIA: No, your Honor.

21 THE COURT: All right.

22 I will ask counsel to alert me when counsel believes
23 it is an appropriate time for me to give that instruction.

24 Now, as to the instruction as to remotely created
25 checks, or RCCs, I propose to give the following instruction to

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1 the jury: As you will see, it draws on both sides' proposed
2 instructions on this point. The main point I want to leave the
3 jury with is that RCCs are a lawful thing, while making clear
4 that the issues in this case do not involve technical
5 compliance with the regulatory definition of RCCs.

6 Here goes:

7 "You have heard reference to something called a
8 remotely created check, also known for short as an RCC. A
9 remotely created check is a check that is not created by the
10 paying bank and that does not bear a signature applied or
11 purported to be applied by the person on whose account the
12 check is drawn.

13 "I instruct you that the banking laws in this country
14 do permit the use of remotely created checks under certain
15 circumstances, provided, of course, that the customer on whose
16 account the check is drawn has authorized the check. However,
17 this case does not involve whether or not the checks in
18 question here meet the technical definition of a remotely
19 created check, and you should not concern yourself with that.

20 "The question for you will be whether or not the
21 government has proven beyond a reasonable doubt the elements of
22 the offenses charged, which, again, are bank fraud and wire
23 fraud. I will instruct you on the elements of those offenses
24 later in the trial, after all of the evidence has been
25 received."

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1 Are there any objections to that instruction?

2 MR. BHATIA: No objection.

3 MR. GELFAND: No objection.

4 THE COURT: All right.

5 Then here, too, I'll ask counsel to alert me when
6 counsel believe it's an appropriate time for me to give that
7 instruction.

8 MR. DiRUZZO: Judge, I already know. I'd ask that
9 instruction be given directly after openings.

10 THE COURT: No, there won't be -- my instruction, as
11 you just heard me say is -- it's going to be triggered by
12 evidence. Once there's some evidence in the case, I'll be glad
13 to give that instruction.

14 MR. DiRUZZO: Oh, okay.

15 THE COURT: In other words, I don't know who the first
16 witness is going to be, but I will wait until there's a factual
17 basis for it.

18 MR. DiRUZZO: Okay. Understood, your Honor.

19 THE COURT: It just seems to me otherwise it's sitting
20 out there in the air unconnected to specific evidence. But
21 given the nature of the case, I expect we'll get there soon.

22 All right. I'm next going to turn to Teman's motion
23 to preclude the government from calling as a witness Karen
24 Finocchiaro of Bank of America. I previously denied Teman's
25 motion to preclude her from being called, which was based on

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1 the incorrect claim that her testimony would be that of an
2 expert witness. In my January 10th bench ruling, I held that
3 she is a pure fact witness who would testify based on her job
4 experience as a senior investigator at the bank on Bank of
5 America's handling of chargebacks and the like.

6 Teman now moves, see Docket 81, to preclude
7 Ms. Finocchiaro's testimony on a separate ground. Teman
8 contends that the government has violated its *Giglio*
9 obligations by failing to turn over records relating to
10 approximately seven different lawsuits in which Bank of America
11 has been sued either by federal regulators like the SEC or FTC
12 or CFPB, or in civil litigation. The government opposes this
13 motion. It notes that it has provided *Jencks* Act material for
14 Ms. Finocchiaro and has conducted a full *Giglio* inquiry as to
15 her. See Docket 82.

16 I deny Teman's motion. I regard it, frankly, as
17 frivolous. The defense has not indicated that the lawsuits
18 have any connection or anything whatsoever to do with
19 Ms. Finocchiaro. The defense has not represented that she was
20 a party or a witness to any of these matters. The defense has
21 not represented that she has personal knowledge of any of them.
22 The defense has not articulated any theory under which she
23 received some form of benefit from the resolution, if any, of
24 any of these cases.

25 Teman's motion appears to proceed from the premise

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1 that because Ms. Finocchiaro works at Bank of America and is in
2 position from her employment there to offer testimony as a fact
3 witness, the door is therefore open to impeach her based on
4 unrelated business practices and unrelated litigations and
5 investigations regarding Bank of America. Teman's motion may
6 also proceed from the premise that ostensible impeachment
7 material that might attach to other persons at Bank of America
8 may be used to impeach Ms. Finocchiaro in this unrelated
9 matter.

10 Teman does not recite any evidence supporting either
11 of these remarkable propositions. Taken to its logical
12 extreme, Teman's theory would open the floodgates to vast
13 productions relating to wholly unrelated controversies under
14 the ostensible rubric of *Giglio* for any bank witness called by
15 the government in a criminal case in which a bank was a victim,
16 even, say, the bank teller who identifies the bank robber.
17 Again, there's no legal authority for that. Teman does not
18 offer any reason for the Court to doubt the government's
19 representation that it has fully searched for and produced all
20 *Jencks* material and *Giglio* material, if any, for
21 Ms. Finocchiaro.

22 As an aside, I would note that conceptually, if Bank
23 of America, as one of the alleged fraud victims here, had
24 received a benefit from the government in connection with this
25 case, for example, as a condition of producing documents or

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1 making a witness available for testimony, the government would
2 have a possible -- if not likely -- constitutional disclosure
3 obligation with respect to that. Whether that would be
4 conceived of as *Giglio* or *Brady* would depend on the specific
5 facts, as would whether it would rise in connection with
6 Ms. Finocchiaro's testimony as a fact witness as opposed to in
7 some other context.

8 But there has been no suggestion whatsoever that
9 anything like that happened here. The lawsuits that the
10 defense cites have nothing -- zero -- to do with Teman or the
11 landlords whose checks he allegedly created and deposited with
12 the authorization he allegedly pretended to have. Whatever the
13 circumstances are under which a benefit to Bank of America
14 might be disclosable as *Giglio* for one of its fact witnesses,
15 those circumstances are not present here.

16 And for much the same reasons, under Rules of Evidence
17 402 and 403, I would not permit the defense to cross-examine
18 Ms. Finocchiaro about unrelated disputes or litigations or
19 investigations involving Bank of America, if that is the use to
20 which the defense had in mind in seeking such materials. Such
21 matters are irrelevant to the issues to be tried here. And
22 even if they were glancingly relevant, which they are not, any
23 probative value to such inquiries would be vastly outweighed by
24 the potential for confusion created by inquiries at this
25 criminal trial into other unrelated areas in which Bank of

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1 America has had business controversies. Bank of America is not
2 on trial here; Mr. Teman is. And he is on trial on specific
3 charges that do not implicate Bank of America's unrelated
4 regulatory and litigation history.

5 Finally, as a separate basis for denying the *Giglio*
6 motion here, I note that the *Giglio* obligation extends only to
7 the prosecution team. There is no basis to believe that the
8 U.S. Attorney's Office here has any knowledge or records of the
9 lawsuits cited by the defense. Thus, even if *Giglio* applied --
10 and it does not -- there would be nothing that the government
11 here would be obliged to produce.

12 Turning next to the final issue.

13 The government moves to limit the defense's
14 cross-examination of two witnesses: Joseph Soleimani and Elie
15 Gabay. Each was a landlord or a representative of a landlord
16 and, as such, each was a customer of Teman's. The parties have
17 filed letters as to this issue; the government's is dated
18 January 19th, the defense's is dated January 20th. Neither
19 party's letter has been filed on the public docket of this
20 case.

21 At the outset, I direct both parties to file these
22 letters publicly on the docket of this case by tonight. On the
23 face of the parties' letter, there is no apparent justification
24 for this motion to be litigated outside of public view. The
25 matters discussed in the letters are in the nature of lawsuits

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1 and publicly disclosed complaints. The allegations in these
2 lawsuits and complaints may be unflattering to witnesses or
3 perhaps to Teman, but there is no basis to override the
4 public's right to access litigation on this motion *in limine*.

5 In the event counsel believe there are discrete facts
6 contained in these letters that are properly redacted, I will
7 authorize you to publicly file the letters with narrow
8 redactions keyed to genuinely confidential matters. I will
9 then determine whether there is a basis for such redactions.
10 Because the request for filing under seal originated with the
11 government, I will direct that the government make its public
12 filing first. The defense should then follow with its
13 redactions until the Court has ruled respecting the areas, if
14 any, in which the government continues to assert a basis for
15 filing under seal.

16 Now, as to the content of the government's motion,
17 Soleimani is a principal of ABJ Properties. Teman allegedly
18 deposited into accounts he controlled 24 checks of ABJ's,
19 totaling \$264,000, allegedly without ABJ's authorization.
20 Gabay is a managing director of Coney Management LLC, which
21 manages properties in the New York area.

22 Teman is alleged to have deposited into accounts he
23 controlled a check for \$18,000, and later three checks totaling
24 \$33,000, each drawn on the account of a company managed by
25 Coney, again, without Coney's authorization.

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1 The testimony of these witnesses appears likely to be
2 important at trial. The government's core allegation as to
3 each set of checks is that Teman pretended he had authorization
4 to deposit checks drawn on the customer's account into his bank
5 account, whereas, in fact, he did not. A key factual issue,
6 therefore, appears to be whether Teman had been authorized or
7 believed he had been authorized by ABJ and/or Coney to create
8 and deposit checks drawn on their accounts.

9 Fulsome cross-examination is therefore in order as to
10 the course of dealings that Teman had with these companies,
11 including these two witnesses, to enable the jury to take into
12 account the full measure of the relationships that Teman had
13 with these customers, which may shed light on whether to credit
14 the government's claim of a lack of authorization or Teman's
15 defense of authorization. The Court will permit searching and
16 thorough cross-examination as to Teman's dealings with these
17 customers.

18 To its credit, the government's letter is not seeking
19 to restrict cross-examination about communications or dealings
20 between these customers and Teman. Instead, the government
21 seeks to preclude inquiry into extrinsic matters involving
22 these companies which did not involve Teman, such as complaints
23 or lawsuits brought by or on behalf of tenants. The government
24 disclosed these matters to the defense and what the Court takes
25 to be an appropriate excess of caution.

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1 The government does not represent -- and nor does
2 Teman -- that the claims of improprieties made against these
3 two customers have any direct bearing on the customers'
4 dealings with Teman. Teman does not allege, for example, that
5 the tenants' grievances towards these customers bears on
6 whether the customers gave Teman permission to create and
7 deposit the checks in question. Instead, Teman's theory of
8 relevance is instead solely that Soleimani's and Gabay's
9 conduct towards tenants bears on their character for
10 truthfulness.

11 I will begin with Soleimani.

12 With one narrow exception, I will exclude all the
13 evidence that the government's letter puts at issue with
14 respect to him.

15 Specifically, the government seeks to preclude
16 examination of him as to lawsuits and tenant complaints largely
17 about the physical conditions of housing his company provided
18 or that caused slip-and-falls and the like. These complaints
19 are inadmissible. Whether or not Soleimani is a punctilious
20 landlord or a negligent or cruel or thoughtless landlord does
21 not bear on his credibility.

22 Relatedly the New York Public Advocate last month
23 included Soleimani on its list of the city's worst landlords
24 based on the number of open violations with the city's
25 Department of Housing Preservation and Development, or HPD.

K1LVTEM1 corrected

1 These violations relate to vermin, defective doors, and the
2 perpetuation of hazards. These regulatory violations or
3 alleged violations do not, however, bear on Soleimani's
4 character for truth-telling. They are inadmissible to impeach
5 his trial testimony.

6 Notably, Federal Rule of Evidence 609 addresses the
7 limited circumstances under which a much more serious bad
8 act -- a criminal conviction -- can be used to impeach a
9 witness. Where the conviction is not one like perjury that
10 intrinsically goes to credibility, it is inadmissible as a tool
11 of impeachment, unless the offense was a felony committed
12 within the last ten years. The regulatory violations that are
13 pending or open against Soleimani do not rise or come close to
14 this level.

15 The government, in fact, represents that it has
16 confirmed that neither Soleimani nor Gabay has a criminal
17 record. The Court will therefore exclude all evidence of
18 violations or alleged violations of housing codes such as those
19 tracked by HPD and all evidence of tenant complaints against
20 these landlords.

21 And for avoidance of doubt, obviously that means,
22 defense, there should not be a peep about this in your
23 addresses to the jury.

24 I do so for two independent reasons under the rules of
25 evidence: First, allegations of mismanagement, negligence, or

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1 being a rotten landlord are irrelevant to credibility under
2 Rule 402. Second, even if such allegations had some bearing on
3 Soleimani's credibility, their probative value would be vastly
4 outweighed by various countervailing factors under Rule 403.
5 Inquiry into these alleged housing code-type violations would
6 tend to confuse the jury, prolong the trial, and invite a trial
7 within a trial as to these separate incidents. Such evidence
8 would also create a grave risk of unfair prejudice to the
9 government and the public insofar as the jury might be led to
10 exonerate Teman of frauds of which the evidence might otherwise
11 establish his guilt because they were swayed by such testimony
12 to loathe the landlords whose checks Teman deposited.

13 There is, however, one allegation that is different in
14 nature. The government's letter discloses that Soleimani's
15 company, ABJ Housing, was fined by the New York Housing Court
16 in connection with a tenant, Stanley Howell, who refused to
17 leave his apartment in exchange for monetary payment.

18 In the housing court case involving ABJ and Howell,
19 the Court found in an October 2018 decision, that because ABJ
20 initiated negotiations with the tenant, ABJ's conduct
21 constituted harassment within the meaning of the New York City
22 Administrative Code. This conduct too, to the extent I've
23 addressed it so far, is also not a proper ground for
24 impeachment. Harassment is distinct from lying.

25 However, as Teman points out in his response, the

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1 housing court judge, Jack Stoller, found in his written
2 decision the following: Referring to ABJ Housing as the
3 petitioner and Howell as the respondent, Stoller wrote:

4 "Petitioner did not dispute respondent's testimony
5 that petitioner's employees stated that petitioner would not
6 renew respondent's lease if respondent did not surrender the
7 subject premises, an empty threat against a rent-stabilized
8 tenant who is entitled to a lease renewal by operation of law.
9 Misleading a tenant into believing that the tenant has no other
10 option but to vacate a rent-stabilized apartment voids an
11 out-of-court surrender." See Exhibit A to the government's
12 letter, at 4. And I have eliminated the case law citations in
13 Judge Stoller's opinion.

14 Judge Stoller's opinion does not disclose whether
15 Soleimani personally was one of the ABJ employees who
16 misleadingly told Howell that his lease would not be renewed if
17 he did not surrender the premises. If not, there is no basis
18 to use another employee's misleading statement as a means at
19 this trial to impeach Soleimani. Soleimani's trial testimony
20 here would not be meaningfully discredited merely because of an
21 employee of his misled a tenant.

22 But it is possible that Soleimani was among the
23 employees who personally made that misrepresentation to Howell.
24 If so, although the question under 403 is a close one under
25 which a court could rule either way, I would then permit the

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1 defense at this trial, as a means of impeachment, to establish
2 through a single question or two put to Soleimani that a judge
3 found that in 2017, he had misled a tenant to believe wrongly
4 that his lease could not be renewed. To be sure, I would not
5 permit under Rule 403 more extended inquiry into this matter,
6 nor would I permit extrinsic evidence of this incident to be
7 received, for example, testimony by Howell or examination of
8 Soleimani regarding what happened and whether he agrees or not
9 with Judge Stoller's finding.

10 But a targeted leading question that elicits from
11 Soleimani the fact of this discrete finding by a judge that he
12 misled a tenant on this subject would assist the jury to assess
13 Soleimani's credibility without turning this proceeding into a
14 trial within a trial about the episode relating to landlord ABJ
15 and tenant Howell.

16 And so, government, I will ask you to please inquire
17 of Soleimani whether there was evidence in the housing court
18 case that he was among the ABJ personnel who dealt with Howell.
19 If his answer leaves any doubt in your mind, you need to follow
20 up and do so immediately. Then promptly report back to the
21 Court and the defense. I expect that if the answer is yes,
22 that Soleimani was among the ABJ personnel who dealt with
23 Howell, that Soleimani will have no difficulty on the stand
24 here answering yes to a question from defense counsel about
25 whether a judge so found. Obviously the government is at

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1 liberty to pull the poison and ask the question on direct as
2 well. Cross-examination will then move on to other issues.

3 For a avoidance of doubt, though, defense counsel, in
4 your opening statement, you are not to refer to such matters,
5 and you are not to inquire into them in court unless and until
6 I have given you the affirmative green light to do so.

7 That ends my ruling as to Soleimani.

8 The bottom line is that, at most, a single question or
9 two about the housing court finding of misleading a tenant may
10 be put to the witness; and then, only upon confirmation that
11 Judge Stoller's opinion was referencing ABJ personnel that
12 included Soleimani personally. Otherwise, Soleimani's conduct
13 as a landlord, including court actions and complaints and
14 statements by the New York Public Advocate, is excluded under
15 Rule 403.

16 As to Gabay, I will exclude the evidence proffered by
17 the government. There is much less of it as to Gabay than as
18 to Soleimani. But that which is addressed in the government's
19 letter does not involve false statements or falsehoods.
20 Significantly, too, unlike the incident involving ABJ and
21 Howell, addressed by Judge Stoller, there is no indication that
22 any finding of dishonesty or untruthfulness has ever been made
23 as to Gabay.

24 In questioning Gabay, Teman would therefore be trying
25 to prove up heretofore unestablished claims of sharp business

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1 practices such as rent overcharges that on their own terms have
2 nothing to do with the bank and wire fraud charges here. Rule
3 403 clearly precludes such an inquiry, which would be in the
4 nature of a trial within a trial, into extrinsic acts of
5 possible bad behavior. Whatever slight probative value might
6 be yielded by this exercise is vastly overcome by the risks of
7 confusion, delay, distraction, and unfair prejudice.

8 Finally, I reject as frivolous Teman's claim that
9 precluding this evidence somehow violates his Confrontation
10 Clause constitutional rights. Teman does not have a
11 constitutional right to probe into unrelated business practices
12 of the witnesses against him, even if such inquiry might tend
13 to dirty up the witness by making them look like a careless or
14 callus landlord. Teman notably does not cite any authority
15 supporting that proposition.

16 All right. Therein ends the ruling.

17 Government counsel, I saw a lot of ferment at your
18 table. Is there something you need to bring to my attention?

19 (Counsel conferred)

20 MR. BHATIA: Your Honor, we will inquire with
21 Mr. Soleimani about more of the facts surrounding this
22 incident. But we wanted to clarify that if Mr. Soleimani was
23 not involved in making the misrepresentations to Mr. Howell,
24 then no inquiry would be made of him on the topic.

25 THE COURT: Correct.

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1 The issue is whether because the judge's opinion
2 refers to people at ABJ, personnel without name, it's left
3 unclear to me whether Soleimani was among those people. To be
4 sure, the issue is not whether what Mr. Soleimani tells you
5 now, the issue is whether there was evidence at the proceeding
6 before Judge Stoller that he interacted with the tenant. If
7 there was evidence that he interacted with the tenant, this is
8 coming in.

9 MR. BHATIA: Evidence that he interacted with the
10 tenant in any --

11 THE COURT: Okay. More precisely, that he interacted
12 with the tenant with respect to the issue of renewal. I expect
13 that you will not credulously take Mr. Soleimani's point of
14 view on this. Mr. Soleimani may or may not have denied in
15 front of Judge Stoller that he personally made those
16 statements. Realistically, if he is among the people
17 interacting with the tenant, I think the safer course here is
18 to -- would be for the Court to permit the line of -- that
19 single question or two, rather than creating an open appellate
20 issue about whether you too aggressively took Soleimani's side
21 in denying -- in perhaps arguing that although he dealt with a
22 tenant, it was somebody else in his company who made the
23 misrepresentations. The judge's opinion is indistinct if
24 Soleimani is among the people dealing with the tenant, given
25 his role at ABJ. It seems to me the safer course here is to

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1 permit that line of impeachment which will be over and done
2 within the context of this proceeding in a matter of a few
3 seconds.

4 MR. BHATIA: Understood.

5 We'll inquire with Mr. Soleimani and we'll give an
6 update to the Court.

7 THE COURT: Very good. Thank you.

8 All right. Anything further from the government as to
9 the range of rulings I've just made?

10 MR. BHATIA: Your Honor, nothing regarding the oral
11 ruling you made. But we do have another point regarding the
12 advice of counsel defense.

13 THE COURT: Yes.

14 MR. BHATIA: Do you want to hear that now or --

15 THE COURT: Let me just tidy up the ruling here.
16 Defense, anything about the range of rulings I've just
17 made?

18 MR. GELFAND: No, your Honor.

19 Just to make sure we're on the same page, we will not
20 address the issue regarding Soleimani in any way, shape, or
21 form until the Court gives us the green light.

22 THE COURT: Bingo.

23 MR. GELFAND: The Court will only give us the green
24 light if Mr. Soleimani was involved with these interactions.

25 THE COURT: Right. If there is evidence that he was

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1 interacting personally with a tenant, I think the factual
2 predicate for the limited inquiry exists. But, to be clear,
3 until I've given the green light, let's not go there.

4 MR. GELFAND: Understood. Thank you, Judge.

5 THE COURT: All right.

6 So with that, yes, Mr. Bhatia, you had something about
7 advice of counsel.

8 MR. BHATIA: Yes, your Honor.

9 As we understand it, the advice of counsel defense
10 requires several elements to be met. Among them, that the
11 defendant sought the legal advice relevant to the conduct at
12 issue in the trial; whether he provided all the relevant facts
13 to his counsel; whether his counsel considered those facts and
14 then relayed relevant advice; then whether the client took the
15 advice; and then, of course, that he consulted prior to taking
16 action. The Court's familiar with those elements.

17 THE COURT: I am.

18 MR. BHATIA: Here, there's nothing that appears to be
19 relevant to the conduct at issue in this trial. If the lawyer
20 was involved in assisting with collection efforts, then it
21 might not be relevant at all to the conduct at issue in this
22 trial, which is whether the defendant had authorization to file
23 the checks in question.

24 And so at this point we'd ask for a proffer from the
25 defense about what facts might establish that defense. That

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1 will help the government, sort of, think about --

2 THE COURT: Well, listen -- thank you. You may be
3 seated.

4 It goes without saying that the mere involvement of a
5 lawyer in a situation does not establish the advice of counsel
6 defense. I think in generic terms, Mr. Bhatia's description
7 broadly captures the essence of the advice of counsel defense,
8 which requires that all material facts be disclosed and that
9 the attorney's advice then cover essentially the conduct at
10 issue here. The actual terms of the advice of counsel defense
11 are familiar ones.

12 Whether an advice of counsel instruction is given to
13 the jury obviously will depend on whether the facts permit
14 that. The defense is obviously running a grave risk if it
15 tries to suggest an advice of counsel and ultimately the advice
16 of counsel elements are not made out here. In that case you
17 are running a risk of an instruction to the jury that you can't
18 possibly meet on the facts, which, if anything, could prove
19 unhelpful to the defense.

20 So I'm assuming that all the defense is doing at this
21 point is exploring the possibility of an advice of counsel
22 defense and is not committed to give one.

23 MR. GELFAND: Your Honor, I don't know if this
24 addresses the Court's inquiry, but we're well aware of what in
25 the Second Circuit is required for an advice of counsel

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1 instruction as far as foundation on an evidentiary basis. We
2 anticipate that the evidence will establish that.

3 THE COURT: You're saying that Mr. -- the evidence is
4 going to show that Mr. Teman disclosed to Mr. Reinitz all
5 relevant dealings with respect to each of the customers in
6 question before he created and negotiated each of the checks?

7 MR. GELFAND: Yes, your Honor.

8 THE COURT: And did he do that in writing?

9 MR. GELFAND: No, your Honor.

10 THE COURT: Is there any memorialization that he did
11 that?

12 MR. GELFAND: Your Honor, I apologize. There was
13 frequent communication by email and other channels.

14 THE COURT: I want that produced to me tonight. We'll
15 see about it being produced to the government, but I want all
16 of that documentation produced to me tonight.

17 Surely if you've been planning all along to consider
18 this defense, you've got it. I want all that documentation
19 from lawyer and client produced; because I do not want to have
20 a situation where because the issue was raised late in the day,
21 we need to take an adjournment of the trial where I work
22 through these issues. So I want that produced to me in full
23 tonight.

24 MR. GELFAND: Yes, your Honor.

25 THE COURT: But you're saying that Mr. Teman -- and I

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1 don't pretend to know the range of dealings with the relevant
2 customers that precedes Mr. Teman's creating and negotiating
3 checks, if he, in fact, is the person who did that in each
4 case. I don't pretend to know what all those were.

5 But you're telling me that you have checked with the
6 lawyer, and the lawyer is prepared to testify that as to the
7 narrative -- the relevant parts of the narrative with each
8 customer, Mr. Teman made a full disclosure?

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: So if the customer, for example, disputed
11 that a debt was owed, Mr. Teman faithfully disclosed that in
12 advance to his counsel?

13 MR. GELFAND: Yes, your Honor.

14 And to even take that one step further, this lawyer
15 was the corporate counsel -- I'm using that term loosely, was
16 Mr. Teman's lawyer with respect to these matters for over a
17 year prior to the alleged criminal conduct. And to be clear,
18 we have disclosed to the government in discovery written
19 communications from the lawyer on Mr. Teman's behalf to two of
20 the three entities, to Coney and ABJ.

21 THE COURT: Right. Sorry.

22 But the involvement of the lawyer, a lawyer can be a
23 collection agent, a lawyer may or may not have access to oral
24 communications between Teman and the customer, a lawyer may or
25 may not have access to email communications between Teman and

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1 the customer; and yet those may be quite material to an advice
2 of counsel defense. If the question is put at one level, does
3 the contract allow the creation of remotely created checks,
4 that's one thing. Another issue is does the -- am I allowed to
5 unilaterally go and cut a check for a debt that the customer
6 denies owing.

7 And the question is going to be whether the full range
8 of communications, for example, was showcased to the lawyer,
9 and the lawyer's advice specifically addressed that, and
10 whether the lawyer under oath is going to come here and say
11 that.

12 MR. GELFAND: Yes, your Honor. And what I'm
13 proffering --

14 THE COURT: Is he going to do that?

15 MR. GELFAND: Yes, your Honor.

16 THE COURT: All right. Well, let's get me all the
17 evidence on that.

18 Are you preparing to -- you haven't given prior notice
19 of an advice of counsel defense. I take it you're not
20 proposing to open on that.

21 MR. GELFAND: Your Honor, to be clear, there is no
22 notice requirement as a matter of constitutional law.

23 THE COURT: But you didn't even include it in your
24 requests to charge; in other words, you misled me. The point
25 is, you know, requests to charge are supposed to anticipate the

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1 issues that might come up. You've been sitting on this as a
2 possibility.

3 How the government missed this issue and didn't raise
4 it with me before is beyond me. But any first-year law student
5 reading the Rule 16 disclosures can see that the case -- that
6 the defense is going to hint at an advice of counsel defense
7 here. Whether or not it makes it or not, I don't know. I
8 don't know how you didn't disclose that. It looks as if you're
9 hiding the ball.

10 MR. GELFAND: Your Honor, we're not hiding the ball
11 per se. As a practical matter, Rule 12 lists three specific
12 defenses that have to be disclosed; this isn't one of them.
13 There's case law that expressly says that we don't have to
14 provide advanced notice of this defense in advance of trial.
15 There is some cases where the -- I'm sorry, where the
16 prosecution has actually affirmatively moved *in limine* or
17 otherwise raised with the court aspects of this defense. And
18 courts have ruled in different ways on that. But that didn't
19 happen here.

20 And so as a practical matter, we're entitled to put on
21 a defense.

22 THE COURT: I agree with you. I'm troubled by what
23 looks to be this strategic excision of it from your requests to
24 charge here. It looks as if you were trying to avoid a motion
25 *in limine* being raised by not including it in your requests to

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1 charge. When I asked for requests to charge, I don't want you
2 to hide the ball and leave out the ones that would suggest
3 motions *in limine*. And the problem is that presumably, had you
4 included that in your requests to charge, the government would
5 have been sensitized to the fact that this issue was there and
6 we could have ventilated whether this is a case in which advice
7 of counsel is viable or not pretrial. And because you didn't
8 include it in the requests to charge, we can't do that.

9 MR. GELFAND: Your Honor, I appreciate what the Court
10 is saying.

11 THE COURT: It's a sharp practice. You're not from
12 the Southern District of New York. I can tell you in the
13 Southern District of New York a lawyer who leaves out something
14 like that that they are considering would be regarded as
15 significantly below the standards of ethics that we anticipate
16 from lawyers here. I'm going to be very blunt with you.
17 That's not good.

18 MR. GELFAND: Your Honor, I can represent that that is
19 certainly not our intention.

20 THE COURT: Let me ask you this: Did you think about
21 including an advice of counsel instruction in your requests to
22 charge to me? Was that something that crossed your mind?

23 MR. GELFAND: In an academic way, yes, but we hadn't
24 fully --

25 THE COURT: So when you, in an academic way, thought

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1 about it, tell me what your academic thinking was in deciding
2 not to include it, when you included the other things, like
3 unanimity. In other words, what was your thinking academically
4 in not including that?

5 MR. GELFAND: First of all, not yet having the
6 totality of discovery. Second of all --

7 THE COURT: Sorry. Wait a minute.

8 You're an officer of the Court.

9 MR. GELFAND: Yes, your Honor.

10 THE COURT: You know what the allegations are here.
11 The discovery as to an advice of counsel defense is uniquely
12 within the defendant's custody and control; it involves your
13 client's communications with his lawyer. Whether or not there
14 is a defense to the allegations in the indictment does not bear
15 on whether or not there is a potential advice of counsel
16 defense that you are reserving the right to make.

17 I understand that if the government's discovery
18 teaches you that there's something blatant that your client
19 didn't disclose to his lawyer you may think twice about going
20 for that defense, I get that. But it was clearly very much a
21 plausible possibility at the time in an academic way you
22 decided not to tell me that this might be a defense.

23 I've drafted the proposed jury charge in this case
24 already, subject to editing it depending on how the case comes
25 in. I don't have an advice of counsel defense because you had

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1 not indicated you want one.

2 Thank you.

3 I mean, you know, you've got to elevate your game
4 here. That's sleazy.

5 MR. GELFAND: Your Honor, what I can say is that's
6 certainly not my intention. That's not how I practice.

7 THE COURT: That's all great and good, but it looks
8 like it was. Just because you say that doesn't mean it's true.
9 You thought about it in an academic way; you decided not to
10 include it.

11 I want the full scope of documentary evidence from
12 Mr. Teman and his lawyer. I want it produced to me tonight.
13 And I want you ready to produce it to the government the moment
14 that I so authorize so that there's no delay.

15 Understood?

16 MR. GELFAND: Yes, your Honor.

17 THE COURT: So I want you to have -- in addition to
18 being produced to me, have a full pair of hard copies in court
19 tomorrow morning so that if I conclude it needs to be produced,
20 you can hand it over to the government table.

21 MR. GELFAND: Yes, your Honor.

22 THE COURT: All right.

23 Government, anything?

24 MR. BHATIA: Your Honor, we note that at this point
25 the defendant still has not waived privilege over these topics,

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1 so we couldn't request discovery. These are documents we'd
2 request, but even as of today of jury selection, there's been
3 no waiver of privilege.

4 THE COURT: Sorry. Did you ask for documents relating
5 to communications between Mr. Teman and his counsel?

6 MR. BHATIA: So that was actually the next topic I was
7 just about to get into.

8 We served grand jury subpoenas, as you know, in
9 December. And for those subpoenas, we requested the basis for
10 any believed authority to deposit these checks, among other
11 things.

12 THE COURT: Right. Sorry.

13 But that was a grand jury subpoena that you submitted
14 a few weeks before the trial was scheduled. And I have
15 determined that, given the date on which you submitted them,
16 right before Christmas, weeks before the trial, I respect that
17 you represent there's a *bona fide* basis for seeking a
18 superseder and will assess that for sure after the end of the
19 trial. That's a grand jury subpoena; that's not about the
20 charges brought here. Bottom line is it wasn't realistic to
21 get that material in time.

22 MR. BHATIA: Your Honor, I think it goes to the idea
23 they knew we were asking about the perceived authority. And I
24 think to get to this trial, immediately after your Honor's
25 ruling, I believe it was January 10th, we served trial

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1 subpoenas.

2 THE COURT: Right.

3 MR. BHATIA: We served them electronically to defense
4 counsel, who had accepted them electronically in the past.
5 This time they just never got back to us on whether they were
6 accepting service. And we found out Friday that they weren't
7 accepting service.

8 THE COURT: Defense counsel, is that true?

9 Sit down. One moment.

10 Is that true?

11 MR. DiRUZZO: Yes. But I just want to make sure --

12 THE COURT: Are you telling me that on January 10th,
13 having previously accepted service of subpoenas, you declined
14 to accept service?

15 MR. DiRUZZO: Your Honor, I don't believe we've ever
16 accepted service previously on a grand jury subpoena.

17 THE COURT: I'm not talking about the grand jury
18 subpoena, and you know that. Mr. Bhatia has said they served
19 you trial subpoenas, after I made it clear that the grand jury
20 subpoena wouldn't be resolved until after this trial is over.

21 Yes or no, did you receive trial subpoenas from the
22 government on or after January 10th?

23 MR. DiRUZZO: Yes, we received --

24 THE COURT: Did you accept service of those trial
25 subpoenas, as I gather counsel had been accepting service

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1 throughout, yes or no?

2 MR. DiRUZZO: No, we did not accept service.

3 THE COURT: All right.

4 Government, please serve Mr. Teman with those
5 subpoenas right now. Defense, those are to be responded to by
6 5:01 p.m. today.

7 Defense counsel, you are in the process of blowing
8 your credibility with the Court. Did you tell government
9 counsel -- when did you tell government counsel that you would
10 not accept service of the subpoenas that were served?

11 MR. DiRUZZO: Your Honor, I don't want to make a
12 misrepresentation to the Court.

13 THE COURT: Good.

14 MR. DiRUZZO: We had numerous phone calls between the
15 four attorneys before you. I can't say for sure when exactly
16 the conversation was, but I know for sure that we never made
17 representations that we had the authority on behalf of our
18 client to accept service.

19 THE COURT: Look, do you dispute that on or about
20 January 10th, Mr. Bhatia emailed you trial subpoenas?

21 MR. DiRUZZO: That I do not dispute.

22 THE COURT: And did you say anything to him indicating
23 that you were not accepting service of those?

24 MR. DiRUZZO: I believe that we had email
25 correspondence, and we indicated that we were not authorized to

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1 accept service.

2 THE COURT: What day was that?

3 MR. DiRUZZO: Your Honor, I would have to check my
4 emails. I can't say for sure.

5 THE COURT: Mr. Bhatia?

6 MR. BHATIA: Your Honor, my recollection of the
7 timeline is this: On January 10th, which was the day of the
8 Court's conference, I think now maybe a little over a week ago,
9 we served the subpoenas. Your Honor, at that conference, had
10 requested the defense to respond to the grand jury subpoena
11 petition to quash by last Friday. So that was the 17th.

12 THE COURT: I understand. That relates to the grand
13 jury. I'm focused on this trial here.

14 MR. BHATIA: So, your Honor, it's relevant because
15 that was the first time we had heard in their filing that they
16 weren't accepting service.

17 THE COURT: When was that, on what day?

18 MR. BHATIA: I believe January 18th, this last Friday.
19 So we saw in a filing that defense counsel said we had
20 attempted to serve subpoenas. And so that prompted in our
21 mind, maybe for the first time defense counsel may not be
22 serving these subpoenas. At that point we emailed defense
23 counsel to say, Do you accept service? Please let us know
24 promptly.

25 THE COURT: All right.

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1 MR. BHATIA: And we heard at that point --

2 THE COURT: Mr. Gelfand, is government's factual
3 representation correct that it wasn't until the -- what did you
4 say, the 18th or the 17th?

5 MR. BHATIA: The 18th, your Honor.

6 THE COURT: -- it wasn't until the 18th that you
7 expressly conveyed you weren't accepting service?

8 MR. DiRUZZO: I have no reason to doubt or contest the
9 government's representation at this point, Judge. I don't have
10 the emails in front of me. I just -- I can't say no. I have
11 to say --

12 THE COURT: Government, please, I'm going to take a
13 two-minute recess. Government, serve the defendant right now.

14 (Recess)

15 (Continued on next page)

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1 THE COURT: Government, have you now served the trial
2 subpoenas on the defendant?

3 MR. BHATIA: Your Honor, to be clear, at the beginning
4 of the conference when I asked to serve a subpoena, that's when
5 I served the if-as-when subpoena, and at the second break I
6 served the three trial subpoenas on the corporate entities,
7 which we had sent --

8 THE COURT: Very good. And that's separate.

9 MR. BHATIA: All four of them have now been served --
10 and we can give you a copy, your Honor -- three trial
11 subpoenas, three corporate entities, and one if-as-when
12 subpoena to the defendant.

13 THE COURT: Defense counsel, Mr. Gelfand, you are
14 telling me now that the defendant is going to be defending on
15 grounds of advice of counsel, correct?

16 MR. DIRUZZO: Yes, your Honor, that's what we intend.

17 THE COURT: All right. You are, I take it, therefore
18 waiving the privilege as it relates to communications with his
19 counsel on this subject.

20 MR. DIRUZZO: I believe we have to. I believe that's
21 the nature --

22 THE COURT: There is no attorney/client privilege now
23 that survives as it relates to the defendant's communications
24 with his counsel Mr. Reinitz with respect to the issues in this
25 litigation -- in this case.

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1 MR. DIRUZZO: With that important caveat, the issues
2 in this litigation, because obviously my client has extensive
3 dealings with other litigations, other simple stuff.

4 THE COURT: Attorney/client privilege is a subject
5 matter concept. The subject matter here involves Mr. Teman's
6 dealings with the customers who were denominated as entities 1,
7 2, 3 and 4. I take it that's the scope of the waiver.

8 MR. DIRUZZO: Right.

9 THE COURT: And obviously therefore the checks
10 purportedly drawn on the accounts of those entities that are at
11 issue in this case, you agree that too is within the scope of
12 the waiver.

13 MR. DIRUZZO: Right.

14 THE COURT: All right. Here is what I would like to
15 do. It's 10 o'clock. I think we are safe, Mr. Smallman tells
16 me, for a half hour just while the jury gets acclimated. If no
17 one has anything else to raise, I will be back here at, let us
18 say, at 10:25. I invite counsel to do whatever research you
19 can in the interim with respect to the advice of counsel
20 defense.

21 One of the immediate issues for me involves the
22 defense's opening statement. It is not crystal clear to me
23 whether the government has done anything to date that has
24 created an obligation on the defense to disclose the potential
25 advice of counsel defense here. It's not clear to me either

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1 what if any free-standing obligation the defense might have had
2 with respect to that point. A natural issue is under the
3 circumstances here where the defense did not volunteer the
4 advice of counsel defense or include a proposed instruction to
5 that effect, whether the defense should be permitted to open on
6 that point. I'm not expressing a view one way or the other,
7 but I would welcome some legal guidance on that point. I will
8 see you in 25 minutes.

9 MR. BHATIA: Your Honor, I just want to say on the
10 topic of timing of when the advice of counsel could present
11 itself, the government expects that it could close -- I should
12 say it could rest its case as early as tomorrow afternoon. So,
13 I think nothing you have said about timing, briefings and
14 discovery would get in the way of that, but we just wanted to
15 give your Honor some notice that it could be as early as --

16 THE COURT: Well, I appreciate that, and that's good
17 to know, and obviously the defense needs to have its witnesses
18 here at the close of the government's case.

19 The immediate issue, given the emergence of a possible
20 or apparently committed advice of counsel defense is whether
21 there has been some breach with respect to notice and what if
22 any implications there are for the defense opening.

23 I want to reserve on that. One possible outcome here
24 is that we defer openings until tomorrow morning just to make
25 sure that I get this right. It has somehow gone unaddressed by

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1 all counsel.

2 Again I will see you at 10:30, and please be prepared
3 to give me guidance on that then. Thank you.

4 Mr. Imperatore?

5 MR. IMPERATORE: I just want to raise an issue with
6 respect to notice on advice of counsel. It's still not crystal
7 clear to the government from what defense has said -- even
8 assuming that what they've disclosed on the record today
9 constitutes notice -- whether the advice that was sought really
10 goes to the central issue in this case, which is whether Mr.
11 Teman had authorization to deposit the checks, as opposed to
12 some collateral issue that the lawyer could have been involved
13 in, for example, collection efforts with respect to Bank of
14 America.

15 So we're asking for whether, in connection with notice
16 here, did the defendant actually seek before acting a lawyer's
17 advice with respect to depositing the checks at issue in this
18 case. It's not clear to us from what has been said whether
19 that actually took place.

20 THE COURT: That is what I understood to be the
21 central issue here. The central dispute is whether or not Mr.
22 Teman had the authority to create and deposit these customer
23 checks, and the intent to defraud element, that is, the mens
24 rea with respect to essentially both bank and wire fraud
25 centrally turns on that issue.

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1 The defense appears to be representing that a lawyer
2 told Mr. Teman on a full presentation of the facts that he had
3 the legal right to do what he did. And, defense counsel,
4 that's the question I am putting to you. The documents you
5 will be producing to me at the close of the trial today I
6 expect will shed more light on whether that really happened. I
7 will see you at 10:30.

8 (Recess)

9 THE COURT: All right. Back on the record. It's
10 10:40. I am told that the jury venire will be here at about
11 10:45, so we will be getting going with jury selection shortly.
12 Let me just ask if in the short interim period if counsel have
13 found any apposite legal authority that bears on whether there
14 was either in general or on the facts here a notice obligation
15 on the part of the defense. Yes?

16 MR. DIRUZZO: Your Honor, moments ago we e-mailed your
17 chambers, cc'ing counsel for the government, the case United
18 States v. Wilkerson, 388 F.Supp. 3rd 969, a 2019 case out of
19 the Eastern District of Tennessee that addressed a government
20 motion in limine in a healthcare fraud case where the
21 government attempted to move in limine to require the defendant
22 to disclose an advice of counsel defense in advance of trial.
23 Your Honor, that case we submit is well reasoned, with
24 citations not only to the Second Circuit case of Scully but
25 also to the Supreme Court's decision in Wardius v. Oregon, 412

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1 U.S. 470 at 476, a 1973 case. We believe this case stands for
2 the proposition that an advice of counsel defense, one, is not
3 an affirmative defense, as that concept is known under the
4 civil rules, under Federal Civil Procedure 8, and that it would
5 be unconstitutional to require a defendant to affirmatively
6 require him to provide this information in advance of trial to
7 the government, and that in particular Rule 16, Rule 12.1.2.3
8 do not provide or impose that obligation upon a criminal
9 defendant.

10 The court in that case further notes that a criminal
11 defendant might make up their minds and tell everyone ahead of
12 trial. On the other hand, the defendant could wait and decide
13 what defenses if any to raise once they see what evidence the
14 government presents.

15 So we submit that this case the Court should adopt and
16 it stands for the proposition that what happened here,
17 especially given that the government did not affirmatively move
18 in limine, even though the Court in the Wilkerson case
19 addressed in that context and denied the government's motion in
20 limine, that it just adds to we believe this Court will be
21 settled position to allow us to not only raise an advice of
22 counsel defense but what happened here was appropriate under
23 the circumstances.

24 THE COURT: May I ask you if Wilkerson identifies any
25 contrary authority?

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1 MR. DIRUZZO: Yes. Wilkerson did say that this issue
2 was not without different views, and Wilkerson at the bottom of
3 page 4 of the West.Law pdf does cite to a D.C. District Court
4 case, U.S. v. Crowder, 325 F.Supp. third 131. It's a 2018
5 case. And it cites to also United States v. Meredith, a
6 Western District of Kentucky case.

7 THE COURT: Very good. Thank you.

8 All right. Government, anything?

9 MR. BHATIA: Your Honor, I think at least upon a quick
10 review Wilkerson might be different in the sense that here the
11 government --

12 THE COURT: I will ask you if you found any authority
13 supporting an application to preclude the defense from pursuing
14 an advice of counsel defense either in general or in their
15 opening.

16 MR. BHATIA: No, your Honor.

17 THE COURT: Are you asking me to preclude that?

18 MR. BHATIA: At this point we're not asking your Honor
19 to preclude it, but we do have a different specific request
20 related to the advice of counsel defense.

21 The government, of course, has conferred with people
22 in the office and thought about this issue. At this point the
23 government doesn't have a lot of facts about it. As you know,
24 we just learned about it. The government is therefore
25 requesting an adjournment of jury selection for 24 hours. The

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1 purpose of that is that we're concerned about swearing in a
2 jury and having jeopardy attach prior to really knowing
3 anything about this defense and what the trial might look like,
4 what the scope of discovery is. I don't know if -- we're
5 prepared it take on a heavy lift, your Honor, of course, to
6 review this and ensure that the Court and the parties'
7 schedules are not interrupted unduly, but at the same time it
8 does raise some concern about having a panel sworn while at the
9 same time there might be dozens or hundreds of thousands of
10 pages of discovery out there. There might be obligations that
11 we have to put on a case in which we're responding to this
12 advice of counsel defense, which itself could -- we just don't
13 know a lot, your Honor, and so for that reason we would request
14 an adjournment for 24 hours to select a jury, and that will
15 allow the Court and the government to evaluate whether there
16 might be a need for a further adjournment or whether there is a
17 need for motion practice. It will give us those options, and
18 we believe that swearing in a jury now is going to preclude a
19 lot of those options.

20 THE COURT: Defense?

21 MR. DIRUZZO: Your Honor, we don't believe that's
22 called for under the circumstances, given that the defense
23 doesn't have an obligation to front this information under the
24 rules, and given that the government just last week produced
25 over 5,000 pages of documents.

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1 THE COURT: I'm sorry. Wait a minute. Maybe you're
2 right and maybe you're wrong. And let's assume even that
3 you're more likely right than wrong that there is no
4 obligation. What is the harm in waiting 24 hours? In other
5 words, I could have had more opportunity to reflect on this
6 issue had, for example, you included this in your request to
7 charge. The only reason this issue came up was because when I
8 read the Rule 16 binder it leapt out at me as something that
9 had gone unaddressed but I thought it's obvious that the
10 defense must be considering such a motion. Had I not raised
11 it, we would have been off to the races. What is the practical
12 harm in waiting 24 hours? I mean your client is way within his
13 speedy trial rights. The trial has been -- the indictment was
14 of relatively recent vintage. My job is to get things right.
15 What's the harm in a 24 hour delay?

16 MR. DIRUZZO: Your Honor, may I have one minute?

17 THE COURT: Yes. Your client is not in custody.

18 MR. DIRUZZO: Your Honor, we would defer to the Court.

19 THE COURT: I mean, look, I'm listening, as you can
20 tell, but on the one side of the equation is the incremental
21 inconvenience and extra night in a hotel room for counsel, the
22 trial starting a day late. On the flip side -- but there is
23 not a lot else -- on the flip side this is a consequential
24 issue, and the risk of picking a jury now -- if there is
25 perhaps going to be a longer adjournment for some reason

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1 unexpected, if the jury has been impaneled we have all sorts of
2 double jeopardy issues.

3 Mr. Bhatia is right if I pick a jury and swear a jury
4 that in practice puts us on a time gun. I still expect the
5 trial will begin tomorrow, but this gives us a chance this
6 afternoon to work through the issues, the volume of materials
7 in question, to determine whether or not you have an obligation
8 to produce those materials in response to the subpoenas. It
9 seems to me that better to make those decisions without the
10 artificial urgency of an impaneled jury.

11 Do you have a counter argument?

12 MR. DIRUZZO: No.

13 THE COURT: Counsel, I think what I'm going to do is
14 as follows: I think we will adjourn jury selection to 9:30
15 tomorrow, but I want to see you this afternoon. May I suggest
16 that we reconvene at 2 p.m.? I know you're free. And I really
17 want to work through the full range of issues here. I want to
18 understand -- off the record.

19 I will see you at 2 p.m. but I want to work through
20 the range of issues. I was about to, Mr. Gelfand, go through
21 those -- Mr. DiRuzzo.

22 MR. DIRUZZO: Your Honor, given the Court's ruling
23 regarding the production of documents at 5 o'clock, just after
24 5 o'clock today, we are going to have our client dilligently
25 work on that and pull the stuff together to comply.

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1 Obviously -- well, not obviously -- it's going to take a little
2 bit of time and we're concerned about meeting the Court's
3 deadline. So, we would like the Court to consider if Mr. Teman
4 could be excused from the 2 o'clock hearing. That way he can
5 get right on it and there won't be any delay in meeting the
6 Court's deadline. I just want to bring that to the Court's
7 tension.

8 THE COURT: I'm sorry. Don't you have a legal
9 assistant at one of your offices who could do that? This is
10 important. This involves the attorney/client advice. Mr.
11 Teman is -- counsel, when I speak to you please don't speak to
12 somebody else.

13 Mr. Teman ought to be part of the brain trust here
14 that considers what I am going to be raising at 2 o'clock.
15 There will be issues about whether or not there is anything in
16 the rules or your correspondence that precludes this issue from
17 being raised in opening or pursued at trial. Thus far I'm not
18 seeing anything that precludes that, but I want to be careful
19 about it. I want to be sure that I'm making a thoughtful
20 judgment about the production of documents, if any, that is
21 required here. And it seems to me that the discussion we have
22 may be informative to Mr. Teman as to the risks and rewards of
23 pursuing this line of defense.

24 I am certainly aware of cases in which defendants have
25 regretted running up the flag pole advice of counsel defenses

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1 only to find that the facts did not bear out the predicates for
2 that. That's a risk that a defendant who pursues this route
3 runs. There may be a real value for Mr. Teman as I gather a
4 nonlawyer to hear counsel's colloquy with the Court.

5 MR. DIRUZZO: OK. How about this, your Honor, for
6 your consideration? We believe that we will be able to produce
7 to the government some documents by the Court's deadline. I
8 want to build in a little bit of slack so that we could produce
9 a couple hours later just to make sure we have all the
10 documents that the government wants and that way alleviate my
11 concern that if we don't have strict compliance with the
12 Court's order by 5:01 that we might subject my client to some
13 type of contempt proceeding or what have you.

14 THE COURT: Mr. DiRuzzo, you are prepared to produce
15 to the court pursuant to my request, and to the government
16 pursuant to its subpoena, at 5:01 a good amount of the
17 responsive materials, but given just the press of business you
18 would ask for leave to continue the rolling production into the
19 evening.

20 MR. DIRUZZO: Yes. And we anticipate the production
21 would come to the government via like a Drop Box type vehicle
22 manner.

23 THE COURT: OK. But the concept here is that the
24 government will receive the full production this evening; it's
25 just that it may come in several tranches beginning at 5

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1 o'clock.

2 MR. DIRUZZO: Exactly.

3 THE COURT: But what you're not going to be doing is
4 objecting to the obligation to produce.

5 MR. DIRUZZO: Correct.

6 THE COURT: OK. Can you estimate for me what the
7 volume of the communications of the documents here looks like?

8 MR. DIRUZZO: May I inquire with my client?

9 THE COURT: Yes, of course.

10 MR. DIRUZZO: Your Honor, it's my understanding that
11 it's hundreds of e-mails spread over a timeframe of multiple
12 years, and it would not surprise me that multiple of these
13 e-mails have embedded attachments in them. We believe that a
14 good majority of these e-mails are already in the possession of
15 the government because these e-mails were directed to ABJ,
16 Coney and DiRuzzo.

17 THE COURT: And who were the parties to these e-mails?
18 These are e-mails that would, you say, be privileged but for
19 the waiver of the privilege, or not?

20 MR. DIRUZZO: No, I'm referring to the subpoena
21 directed at the corporations, where the Court ordered for us to
22 produce those corporate documents, records that are subpoena to
23 subpoena duces tecum by 5:01. Those responsive documents would
24 be e-mails between Mr. Teman and individuals at GateGuard,
25 mainly Mr. Teman, Mr. Teman attorney Mr. Reinitz and the

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1 individuals associated with ABJ, Coney and Mercer.

2 THE COURT: Let me break this down. There are really
3 two distinct document issues here. There is likely
4 considerable overlap among them, but just to be precise one
5 issue involves the government's trial subpoenas which they
6 thought they had effectively served on you on January 10 and
7 which you notified them on the 18th or so you were not
8 accepting service of and therefore I ordered be served today
9 and be responded to today, given the disappointing gamesmanship
10 at the back table about those subpoenas.

11 MR. DIRUZZO: That's what I was referring to, correct.

12 THE COURT: Right. As to those, will those materials
13 contain attorney/client communications with the attorney at
14 issue here Mr. Reinitz?

15 MR. DIRUZZO: No. We have Mr. Reinitz -- during the
16 break I was on the phone with him -- that being Mr. Reinitz --
17 letting him know he needs to pull together all of the e-mails
18 between Mr. Reinitz and Mr. Teman, and he is working on that.
19 That was not what I was referring to. Because I believe your
20 Honor said that we had produced those to you tonight and be
21 prepared to produce those.

22 THE COURT: OK. But are those responsive? Because
23 they're coming from Reinitz, you're saying they are not
24 responsive to the government's subpoenas to the company? I
25 mean Reinitz is an agent of the company, right? He is an

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1 employee. So if the subject matter of the government's trial
2 subpoena includes employees or agents of the company,
3 presumably it covers Reinitz. Is he outside lawyer or is he an
4 employee of the company?

5 MR. DIRUZZO: Outside lawyer.

6 THE COURT: But he is an agent of the company? He is
7 a client? The principal is the company; he is their agent?

8 MR. DIRUZZO: Mr. Reinitz would be Mr. Teman's and
9 Gate Guard's agent, yes.

10 THE COURT: And does the subpoena from the government
11 require the production materials in the company's custody,
12 possession and control?

13 MR. DIRUZZO: With the Court's indulgence. Yes, your
14 Honor, paragraph 3.

15 THE COURT: All right. By definition, the agent is
16 controlled by the principal. It seems to me that you can't
17 claim that Reinitz is outside the company's control. He is
18 their lawyer. If the client says give me your reports, the
19 lawyer has to produce those.

20 So, with the benefit of this colloquy and you're now
21 having focused a little more on the subpoena, is it your still
22 your view that materials physically possessed by Reinitz are
23 outside the scope of the government subpoena?

24 MR. DIRUZZO: No, your Honor. But if I may clarify, I
25 was looking for a little bit more time for my client Mr. Teman

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1 to provide the documents to the government that are responsive
2 to the trial subpoena served on the entities. Separate and
3 apart, Mr. Reinitz is working as --

4 THE COURT: But it's not separate and apart, Mr.
5 DiRuzzo. If Reinitz is an agent of the company and the
6 government subpoena to the company picks up documents possessed
7 in the company's control. That includes the agents that the
8 company controls; that includes Reinitz.

9 And you're not disagreeing with that. You're nodding.

10 MR. DIRUZZO: No, I agree there is a substantial
11 overlap.

12 THE COURT: So let's put aside my request for advice
13 of counsel related documents. Let's focus simply on the
14 government subpoena. In terms of the content of that subpoena
15 does -- any reason to think it doesn't reach communications
16 between Reinitz and the company, including its Officer Teman
17 relating to the matters at issue in this case. I assume it
18 must reach that. I haven't seen the subpoena.

19 MR. DIRUZZO: I would agree. There may be some
20 exceptions but for the most part I agree.

21 THE COURT: If that's really the case, we are really
22 talking about attorney/client communications I take it that
23 are -- or communications relating to advice of counsel that are
24 both responsive to the government's trial subpoena and to my
25 oral court order.

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1 MR. DIRUZZO: Exactly.

2 THE COURT: So, let's focus on government subpoena
3 here. You with waived privilege with respect to the
4 attorney/client communications bounded by the subject matter of
5 this case.

6 MR. DIRUZZO: Correct.

7 THE COURT: You have agreed to produce materials
8 responsive to the subpoena to the government today beginning at
9 5 o'clock and then rolling in the evening, correct?

10 MR. DIRUZZO: Correct.

11 THE COURT: So QED, to the extent that attorney/client
12 communications are responsive to the subpoena, those will be
13 produced today whether from the servers of the company directly
14 or from its agent Reinitz, correct?

15 MR. DIRUZZO: Correct.

16 THE COURT: OK. And so your application is simply for
17 grace on my part to relieve you from the obligation to produce
18 all that at 501. You are prepared to produce as much as you
19 can by 5:01 and the balance rolling in the evening as fast as
20 you can.

21 MR. DIRUZZO: Exactly.

22 THE COURT: But to be clear, in effect that is going
23 to discharge, it sounds like, the production obligation of my
24 separate oral order about advice of counsel, because it doesn't
25 sound like there are advice of counsel documents other than

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1 that are possessed by the company or its legal agent Reinitz,
2 correct?

3 MR. DIRUZZO: Correct.

4 THE COURT: OK. So I think we're dealing with one
5 issue, not two, and I would welcome then receiving on the same
6 schedule as the government the documents that you are producing
7 to the government.

8 MR. DIRUZZO: OK.

9 THE COURT: I am just trying to make this easy, but I
10 think working through this, given the privilege waiver, given
11 that the attorney is an agent of the company, and given that
12 the government's subpoena is broad enough to pick up the
13 attorney/client communications here, it seems to me all this
14 stuff gets produced tonight pursuant to the subpoena. You are
15 not disagreeing with that, are you?

16 MR. DIRUZZO: No. My concern I want to make sure my
17 client is not held in contempt because we couldn't get
18 everything out at 5:01.

19 THE COURT: Before I bless what sounds like a
20 reasonable proposal, let me hear from the government. Mr.
21 Bhatia?

22 MR. BHATIA: May we have just a moment?

23 THE COURT: Yes.

24 MR. BHATIA: So, to be clear, we understand that the
25 subpoenas will cover records sufficient to establish the advice

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1 of counsel defense, the one at trial, but we do reserve --

2 THE COURT: Does your subpoena -- without perhaps
3 literally saying those words, because it sounds like you
4 haven't given thought to the advice of counsel defense until I
5 raised it -- does the subpoena nevertheless in its verbal
6 formulation, is it broad enough to pick up materials that are
7 responsive to the advice of counsel defense?

8 MR. BHATIA: The subpoena could pick up some records
9 that are responsive -- that would implicate the advice of
10 counsel defense -- but it may not encompass all of them.

11 THE COURT: Look, you may sit down. I just want to be
12 able to look at Mr. DiRuzzo.

13 Counsel, I am trying to be a force for clarity and
14 good here. It seems to me that given the privilege waiver here
15 what I don't want to have happen is that because the
16 government's formulation in its January 10 subpoena may have
17 not picked up the words "advice of counsel" the defense winds
18 up making an incomplete production.

19 Mr. Bhatia, if it is your intention to broaden the
20 subpoena that you wrote on January 10 and served today to pick
21 that up, may I suggest you take the subpoena back, handwritten
22 "sufficient" to pick up the balance of those documents, so
23 there is no technical issue here under which the defense is
24 able to claim that certain documents fell outside of the
25 subpoena calls.

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1 Mr. DiRuzzo is helping you here because he is
2 acknowledging his expectation on a first read that the subpoena
3 already picks that stuff up, but just so we don't have any
4 verbal gamesmanship here, the better course -- and I will take
5 a five minute recess now -- is to modify the subpoena to
6 explicitly pick up communications bearing on advice of counsel
7 with respect to the matters at issue in this case.

8 MR. BHATIA: We will.

9 THE COURT: I think that solves our -- that closes
10 that gap, correct?

11 MR. BHATIA: That's right.

12 THE COURT: Mr. DiRuzzo?

13 MR. DIRUZZO: Your Honor, we would be amenable to
14 counsel for the government amending the e-mail because it's an
15 e-mail, and that way it's documented.

16 THE COURT: Why don't we do this: We will take a five
17 minute recess. Government counsel will write out what it
18 purposes. They will run it by you. I am sure you will
19 agree -- because you have been agreeable to the idea of
20 proposing this -- and we will put it on the transcript of the
21 hearing when we resume in five minutes. That way you've got it
22 in writing too.

23 Look, in the meantime when I come back in five minutes
24 let's talk through about what is happening at 2 o'clock. I
25 just want to make sure collectively we're issue spotting. It

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1 doesn't sound like the volume of documents here -- although it
2 will give a late night to government counsel -- is so
3 foreboding as to require further adjournment, but we will see.
4 But there obviously is going to be an issue about whether there
5 is something that precludes the defense from proceeding as to
6 advice of counsel. I am not hearing it yet. I'm not seeing
7 anything on first read anything in the Federal Rules or the
8 parties' back-and-forth that in any way precludes it. It looks
9 as if it's a tool in the defense tool box. They can choose to
10 use it with all the risks and rewards that doing so entails. I
11 am not finally resolving that, but it's my first initial
12 instinct, but I will want to make sure that we take that up so
13 there is complete clarity beginning this afternoon at to
14 whether or not that's in play. I want you all to know what is
15 fairly in play in terms of opening statements. I will see you
16 in five minutes.

17 (Recess)

18 THE COURT: All right. Be seated.

19 Government counsel, have you worked up an annotation
20 to your trial subpoena that is sufficient to comfortably
21 embrace the advice of counsel documentation that you are
22 seeking and that Mr. DiRuzzo is said it's prepared to produce
23 today?

24 MR. BHATIA: Your Honor, we actually just finished
25 formulating the proposal. We have not talked about it with

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1 defense counsel.

2 THE COURT: I will stay on the bench. Take a moment
3 with the defense.

4 MR. GELFAND: Your Honor, we're fine.

5 THE COURT: So, defense, Mr. Gelfand, you are fine
6 with what the government is articulating as its addition to the
7 terms of the subpoena that was served in person today?

8 MR. GELFAND: Yes.

9 THE COURT: Great.

10 Mr. Bhatia, would you kindly slowly for the benefit of
11 the court reporter put that language on the record.

12 MR. BHATIA: Yes, your Honor. So we propose to put at
13 the end of the subpoena a phrase that states "For avoidance of
14 doubt, this subpoena calls for the production of any and all
15 documents relating to communications with attorneys and
16 documents reviewed by attorneys relating to the allegations in
17 the indictment, business dealings with the entities listed in
18 the indictment, contracts, terms and conditions and payment
19 terms, the checks listed herein, including but not limited to
20 any communications with Mr. Teman about, or documents provided
21 by Mr. Teman, and any documents that could support an advice of
22 counsel defense.

23 THE COURT: Very good. And we all agree -- I think
24 defense counsel has -- that the subpoena runs to employees and
25 agents of Mr. Teman's companies which specifically includes at

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1 least the agents part attorney Reinitz, right?

2 MR. GELFAND: Yes.

3 THE COURT: I think we're then at peace with respect
4 to the scope of the document production obligation. And, Mr.
5 DiRuzzo, I appreciate your proposal essentially to make a first
6 production at five and then rolling productions thereafter.

7 If you're able to make a first production before five,
8 I know that all concerned -- the government as well as the
9 Court -- would appreciate it.

10 MR. DIRUZZO: Understood, your Honor.

11 THE COURT: I will ask that -- I don't know how
12 voluminous this will be. In the end I will need this in a
13 binder form. I don't know what sort of a legal support network
14 you have here in New York. That will help me. I will give you
15 a little bit of leave on that, but ultimately it's hard for me
16 on the bench to consult something electronic. I proceed more
17 the old fashioned way, as the government has in its Rule 16
18 binder, so please get to that.

19 MR. DIRUZZO: Understood.

20 THE COURT: OK. So I think this leaves us then with
21 what we're taking up at 2 o'clock. This has all happened all
22 of a sudden. I raised this at the very outset of the
23 conference, and it turns out that I awoke a sleeping giant of
24 an issue here, and so I want to make sure that together we have
25 covered all the angles at 2 o'clock so that there aren't any

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1 surprises.

2 One potential issue is whether, as I said, the defense
3 is -- is there something that precludes the defense from
4 opening on advice of counsel. I'm not seeing it, but I want to
5 make sure I have the parties' respective views on that. I
6 would like each of you to commit to whether there is any legal
7 basis for the defense to be precluded from doing that. Again,
8 I'm not seeing it, but I think it's responsible for me to ask
9 for your views.

10 A second question -- and I offer this really for the
11 benefit of Mr. Teman -- is what happens, the defense opens on
12 advice of counsel, then ultimately the facts at trial do not
13 make out the prerequisites of that. I have a memory that what
14 winds up happening in effect is that there is an instruction by
15 the jury that advises them that advice of counsel is not
16 available here, in effect that you have heard references to it,
17 that a requirement is that all material facts be disclosed. If
18 there isn't a factual basis on which the jury could so find,
19 there might be a basis for me to instruct the jury explicitly
20 that it doesn't apply here, although the jury may consider the
21 communications with counsel for what they're worth in
22 evaluating the broader issue of intent. But the issue here is
23 in effect what happens and how it could redound to Mr. Teman's
24 detriment if he opens on advice of counsel and ultimately can't
25 keep the promise. And I want to make sure that your client --

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1 who has obviously been a consumer of legal talent over the
2 years, as the discovery reflects, is mindful of the risks and
3 rewards of going to this place.

4 In other words, it's not at all surprising to me would
5 have thought about an advice of counsel defense -- it leaps off
6 the page reading the Rule 16 material -- but it's another story
7 when you decide to go there. I just want to make sure that we
8 have a discussion about what happens if Mr. Teman can't keep
9 the promise that you are perhaps proposing to make in opening.
10 I want him either out of solicitude for him to be aware of what
11 the consequences might be. So, I welcome counsel's opining on
12 that. Again, I will make a final decision as to any
13 instructions later in the case when there is a factual
14 predicate, but I think given the apparent importance of the
15 issue I want to make sure we have covered this.

16 I will also want a clear statement from the defense
17 that the only advice of counsel that we are talking about comes
18 from Reinitz and not from somebody else. I don't want this to
19 be an Oh Henry story where there is another surprise ending on
20 the last page and it turns out there is another mystery lawyer.

21 I am understanding from what you have proffered that
22 the advice of counsel turns defense, such as it is, turns
23 solely on an advice from Reinitz. I want to make sure that
24 there is clarity about that.

25 Government, are there any other issues that you think

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1 are profitably addressed at 2 o'clock?

2 MR. BHATIA: Your Honor, nothing else for 2 o'clock.
3 I will say we would ask to the extent the defense has any
4 documents already marked as exhibits that might be relevant to
5 the attorney/client defense, that they produce those now. It
6 might help all of us to sort of get started on this.

7 THE COURT: I agree. Defense counsel, as you can
8 tell, I'm disappointed to say the least at the way the trial
9 subpoena was in my view sandbagged. Under those circumstances
10 I think it's absolutely right for me to ride you to produce
11 everything you can as soon as you can, and so to the extent
12 you've got materials now or before 2 o'clock and before 5
13 o'clock, these should be produced forthwith.

14 To be sure, the government could have raised this
15 issue and been explicit about advice of counsel earlier. It's
16 obvious from the Rule 16 material that Mr. Teman has had
17 lawyers drafting legal documents, and he is referencing
18 lawsuits. This was a spottable issue to say the least. I'm
19 certainly not inclined to put over the trial further on account
20 of the production of documents that may be coming today, but
21 I'm also not inclined to give you any incentive or interest in
22 delaying the production.

23 At least some of these materials were -- should have
24 been produced shortly after the January 10 subpoenas -- trial
25 subpoenas that the government served, and only because of what

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1 I regard as described to me as sharp practice were those
2 productions not made earlier. So, I want you to jam on that
3 and get it going promptly.

4 MR. GELFAND: I would just represent for the
5 government's benefit is that I am 99.9 percent sure -- and will
6 be 100 percent sure after we break for this morning -- that
7 anything that is premarked as a defense exhibit has been
8 disclosed to the government. Obviously -- including, by the
9 way, documents, for example, e-mail correspondence, from
10 Mr. Reinitz to various people, which were disclosed early on in
11 this case. So, we will double check to Mr. Bhatia's request
12 and make sure that that's the case, and if something fell by
13 the wayside, we will certainly follow up with that.

14 THE COURT: So when you say predisclosed, does that
15 mean materials that are not in the government's exhibit binder
16 but which have been produced by the defense?

17 MR. GELFAND: Yes, your Honor.

18 THE COURT: And what's the volume of that?

19 MR. GELFAND: The amount of documents that we have
20 disclosed --

21 THE COURT: Disclosed meaning produced, right?

22 MR. GELFAND: -- produced in discovery -- fall into
23 thousands of pages, are anticipated potential exhibits which
24 will obviously depend on what the government does in its case
25 --

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1 THE COURT: Of course.

2 MR. GELFAND: -- is a much smaller sub set.

3 THE COURT: Right. But, in other words, you've
4 produced thousands of pages already to the government. Have
5 you within that universe done anything to tag the documents
6 that are apt to be and if not certain to be defense exhibits?

7 MR. GELFAND: In the context of some discussions that
8 we had with stipulations, we e-mailed them plus or minus about
9 ten or so premarked defense exhibits -- the earliest possible
10 defense exhibits -- that were marked as exhibits. And as
11 hopefully the Court can appreciate, some of what we have marked
12 as exhibits are actually duplicative of government marked
13 exhibits.

14 THE COURT: Sure. When I read through the
15 government's exhibit binder I can't say that I remember. I had
16 no idea who Reinitz specifically was, but I can say I remember
17 seeing communications with him.

18 Presumably if you are going to pursue an advice of
19 counsel defense and are claiming that there was comprehensive
20 disclosure of all material issues, some of that I guess you
21 would contend is memorialized in documents. And I take it
22 those would be among the documents that you would be also
23 intending to offer at trial if you go that route?

24 MR. GELFAND: Your Honor, to be clear, our intention
25 with the advice of counsel defense at trial is to elicit it

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1 primarily through testimony and through e-mail correspondence
2 that is not privileged that has been disclosed to the
3 government and in some cases disclosed by the government.

4 THE COURT: The testimony would be of Reinitz and/or
5 Teman. Are there other people who are privy to the alleged
6 advice of counsel?

7 MR. GELFAND: No, your Honor.

8 THE COURT: All right. So it's ultimately Mr. Teman's
9 decision whether to call a witness and whether to testify
10 himself, but what you're saying is if you're committing to an
11 advice of counsel defense, since there is presumably nobody
12 else who can authenticate written communications -- let alone
13 oral communications -- between Reinitz and Teman, one or both
14 of them needs to testify in order for you to get that out there
15 before the jury.

16 MR. GELFAND: Yes, your Honor. But to be clear, we
17 don't have an intention at least at this point of introducing
18 any documents that are communications between Mr. Reinitz and
19 Mr. Teman. The communications at issue are written
20 communications as opposed to testimonial -- anticipated
21 testimony of Mr. Rinitz are communications between Mr. Rinitz
22 and, for example, Elie Gabay and Jospeh Saleimani.

23 THE COURT: And those would -- would those be relevant
24 to advice of counsel or something else?

25 MR. GELFAND: Only in a very circumstantial way. It's

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1 not the core of the advice of counsel defense, but they clearly
2 establish that prior to the dates at issue Mr. Teman had legal
3 counsel in connection with this issue. So I would say
4 circumstantially it's relevant.

5 THE COURT: Well, they're relevant, you are saying,
6 insofar as they show the existence of a counsel relationship.
7 That may not ultimately be in dispute. But the substance of
8 the communications that Reinitz allegedly had with, let's say,
9 @Mr. Gabay, does the content of that bear on an advice of
10 counsel defense?

11 MR. GELFAND: It does, because the content of that --
12 but circumstantially -- the content of that is Mr. Reinitz
13 explaining to Mr. Gabay and Mr. Soleimani -- and I am
14 paraphrasing -- that they were contractually bound by the same
15 contracts that form the basis of what we anticipate is the
16 authority to issue the RCCs.

17 THE COURT: All right. And so to the extent it bears
18 on the advice of counsel defense, it documented communication
19 between Reinitz, let's say, and Gabay -- I will just use Gabay
20 as an example -- would tend to corroborate that if Reinitz was
21 speaking with Gabay about contractual authority, it stands to
22 reason he was speaking with his client about contractual
23 authority to create an RCC.

24 MR. GELFAND: Yes, your Honor. If that's all we had,
25 there is no advice of counsel defense. I said if that's all we

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1 had, then there is no advice of counsel defense, but I think
2 it's relevant in that it corroborates --

3 THE COURT: Just explain to me -- because you
4 understand the facts of the case better than I -- what would it
5 take then -- without limiting you to it -- what more would it
6 take in your view for there to be a viable advice of counsel
7 defense here? What would need to be disclosed?

8 MR. GELFAND: Testimony -- or other events, but I
9 anticipate it would be testimony -- that Mr. Reinitz had all of
10 the relevant material information to give advice.

11 THE COURT: Right. I mean just again because you
12 understand the back story and I don't, but in general what
13 might that be beyond the existence of a contract that says what
14 it says?

15 MR. GELFAND: First of all, Mr. Reinitz was the
16 counsel for the company for a substantial amount of time prior
17 to this.

18 THE COURT: Right.

19 MR. GELFAND: And so he personally had access to the
20 records of Gate Guard. He who was involved in some capacity in
21 various instances of revising or editing them. He personally
22 communicated with two of the three customers -- in particular
23 Mr. Soleimani and Mr. Gabay -- that are at issue of the three
24 entities listed in this indictment, with respect to their
25 obligations for the money, the fees if you will, that were

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1 ultimately deposited into Bank of America through the RCCs that
2 are at issue in this case. He had communications with Mr.
3 Teman, in particular oral communications that I anticipate he
4 would testify to. He had further communications subsequent to
5 the act -- which I don't think would be relevant at all -- with
6 a lawyer for Mr. Soleimani, when Mr. Soleimani retained
7 counsel. I think the Court can obviously address the relevance
8 of that and the admissibility of that later.

9 As a practical matter --

10 THE COURT: Yeah. I mean I'm not sure -- it's not
11 obvious to me what the communications between outside counsel
12 and outside counsel are. The issue is really what is
13 communicated to the defendant as it informs the defendant's
14 state of mind, because in the end the issue is whether the
15 defendant did or didn't have the mens rea called for by the
16 bank and wire fraud statutes.

17 MR. GELFAND: And to be clear, I agree generally
18 speaking -- obviously we can take up specific language from the
19 jury instruction standpoint -- with what Mr. Bhatia represented
20 to the Court are the elements in essence of reliance of
21 counsel. It's set out pretty clearly in the Scully case. In
22 any event, we believe that Mr. Reinitz's testimony will
23 establish an evidentiary foundation for the jury to conclude,
24 if it wants to, sufficient grounds --

25 THE COURT: Will Mr. Reinitz's testimony be able to

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1 place in time the communications he had with Mr. Teman?

2 MR. GELFAND: Yes, I believe it will. These were
3 ongoing communications for over a year.

4 THE COURT: Sure. But the question is at some point
5 is something left out before Mr. Teman creates and deposits the
6 check? In other words, I have read through the exhibit binder.
7 In at least one of the contracts there appears to be a written
8 provision authorizing the creation of RCCs. There is a
9 separate issue of under what circumstances. Let's suppose a
10 customer disputes that they owe money and conveys that to Teman
11 such that there is a clear dispute between the customer and
12 Teman as to whether or not a debt is owed. Right? The
13 question is whether -- where it's not an undisputed debt but
14 it's a disputed one -- whether Teman has conveyed to his lawyer
15 the customer's denial of a legal -- of an obligation to pay the
16 debt and the customer's factual basis for same.

17 Again, I don't know whether that's all that's going on
18 there, but that at least was -- on the face of the government's
19 exhibits, it seems to me apparent that at least to some of the
20 asserted debts here the customer -- it's not like it's an
21 undisputed debt that Mr. Teman is using his asserted
22 contractual authority to cause to be paid. There appear to be
23 disputes with the customers, and even statements by Teman that
24 his company is shutting down, and then at some point afterwards
25 I gather Mr. Teman uses that purported contractual authority.

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1 The question with respect to advice of counsel is did counsel
2 know before Mr. Teman did that all of that which the customer
3 said, including denying the existence of the debt, and in the
4 face of that did the counsel then say you may nevertheless
5 create a check to pay yourself a debt that the customer denies
6 having.

7 MR. GELFAND: Yes, your Honor. I anticipate that the
8 testimony would be that he did have all of that relevant
9 information.

10 THE COURT: That the lawyer knew exactly what the
11 customer was saying and denying, and in the face of that told
12 Mr. Teman go ahead and write a check on the customer's account
13 without notice to the customer?

14 MR. GELFAND: Yes, your Honor. I don't want to -- I
15 mean the specificity of the words may be a little different but
16 in substance yes.

17 THE COURT: OK. Well, we'll see. That's helpful.
18 But, in other words, I take it that you are acknowledging that
19 it isn't merely the face of the words of the contract but the
20 course of dealings between Teman and the customer that inform
21 what needed to be disclosed before an advice of counsel defense
22 could get to a jury.

23 MR. GELFAND: Yes, your Honor, for the advice of
24 counsel issue. I think separate and apart from the advice of
25 counsel issue there is just a general lack of mens rea defense

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1 on the contract itself which doesn't require --

2 THE COURT: Sure. And you are at liberty to argue
3 that even if there is never a lawyer involved, that Mr. Teman
4 read the contract to empower him to do all sorts of things and
5 that those documents are not consistent with finding intent to
6 defraud beyond a reasonable doubt. You are at liberty to make
7 that argument, and I fully anticipated that from the review of
8 the discovery materials. What was unclear to me from them was
9 whether you intended to add to it the advice of counsel defense
10 with all that it requires. And I now know that the answer is
11 barring a change of heart, yes.

12 MR. GELFAND: Yes, your Honor. And I think this might
13 help, because I gather what the Court is asking in substance is
14 did Mr. Reinitz have more than just the documents, more than
15 just the contracts. And the answer is abundantly yes.

16 (Continued on next page)
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1 THE COURT: But more than that, there is a narrative
2 presumably that exists with each of these customer
3 relationships. I'm ill-positioned at this point to define what
4 parts of that narrative are material as opposed to background
5 noise. But there are -- whatever the material components of
6 the business disputes or business relationship are, you're
7 representing to me that Reinitz knew them, knew that -- that
8 Teman had made sure Reinitz knew them before asking Reinitz for
9 his advice on whether he could create/negotiate the checks.

10 MR. GELFAND: Yes. Or just to be even more precise,
11 that Mr. Reinitz's source of knowledge in some instances was
12 from his own personal interactions. In other words, he's a
13 fact witness as well.

14 THE COURT: Sure. But Mr. Teman needs to know that
15 Mr. Reinitz knew those facts for the advice of counsel defense
16 to apply.

17 MR. GELFAND: Of course.

18 So, for example, there's instances where Mr. Reinitz,
19 at Mr. Teman's request, communicates directly with, for
20 example, Joseph Soleimani about the contractual obligations.
21 So obviously Mr. Teman directs Mr. Reinitz to do that. I think
22 that he obviously knows that Mr. Reinitz did it.

23 And Mr. Reinitz, I anticipate, would testify to
24 those -- within the rules of evidence, but to those
25 interactions and how that, you know, was communicated to

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1 Mr. Teman. Because obviously -- and I want to be clear. Our
2 intention is not to elicit testimony directly about what
3 Mr. Reinitz believed, other than as it was communicated to
4 Mr. Teman.

5 THE COURT: The advice of counsel defense requires the
6 attorney -- the client to have ensured that the material
7 information was communicated to the lawyer. I'm not aware that
8 there's any means of communication that's needed. So whether
9 it's, Read these documents, or, Hear my story, or, here, Speak
10 to the counterparty and report back to me, I can imagine any
11 number of different ways, but the central ingredient here is
12 that the client, Teman, assured that his lawyer knows the
13 material facts before asking for legal advice on them. And
14 you've charted out a confident position that, presumably with
15 respect to each set of entities, the attorney was known by
16 Mr. Teman to know all of the material facts and nevertheless
17 gave him an unambiguous green light to engage in the conduct
18 that the government says was unlawful.

19 MR. GELFAND: That's what I anticipate the testimony
20 would be, your Honor.

21 THE COURT: What is Reinitz's legal expertise?

22 MR. GELFAND: He's a partner at a law firm called
23 FisherBroyles. He is a, kind of, general corporate lawyer who
24 also, as I understand it, has somewhat of a subspecialty in
25 intellectual property, but doesn't limit his practice to that.

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1 And he served as corporate -- I at the very least use
2 the word corporate counsel, meaning counsel to Mr. Teman and
3 some of the entities at issue, not limited to GateGuard, going
4 all the way back to, I believe it was, 2014 or 2015. GateGuard
5 didn't even exist until 2016, and that was at a prior firm that
6 he was at. And then he became GateGuard's counsel over -- I'll
7 get the exact date, but over a year before the alleged
8 allegations.

9 THE COURT: And the conduct at issue is in 2019. From
10 the Rule 16 -- excuse me, from the government exhibit binder,
11 it looked as if there was some issue with respect to GateGuard,
12 I suppose, in 2018? You don't have to answer, but if you're
13 able, since we're talking about it, I'm just curious what --
14 does GateGuard have business issues? Does it go under? What
15 happens with it?

16 MR. GELFAND: No, your Honor. There's a single email
17 that we actually intended to introduce the response to the
18 email, if the Court is referring to an email from Mr. Teman to
19 Ben Soleimani and Joseph Soleimani, the principals of ABJ.

20 THE COURT: I think that this is referenced actually
21 in one of the government's letters on a motion *in limine*, that
22 there had been some business reversal or Mr. Teman had
23 represented to one or more of the customers that his company
24 was having issues in 2018, I thought. I may be misrecalling.

25 MR. GELFAND: Your Honor, I don't believe that you're

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1 misrecalling. I think there is a dispute within -- as to what
2 that factual narrative actually is between the parties and what
3 the documents bear out. But, no, GateGuard continued to
4 operate to this day.

5 THE COURT: Were there ever any civil litigations that
6 actually were brought with respect to any of the victims in
7 this -- not victims, the customer, the alleged victims -- the
8 alleged nonbank victims in this case?

9 MR. GELFAND: To my knowledge, your Honor, none of the
10 victims initiated -- the alleged victims, initiated any civil
11 litigation, and GateGuard did not initiate --

12 THE COURT: Mr. Teman repeatedly threatens legal
13 action in the documents. Did he or his companies ever initiate
14 any with respect to any of the customers at issue here?

15 MR. GELFAND: May I confer about that?

16 THE COURT: Yes, of course.

17 (Counsel and defendant conferred)

18 MR. GELFAND: Your Honor, no litigation was actually
19 filed.

20 THE COURT: May I ask you, before I just turn to the
21 government, and then I'll give you a break so that you can all
22 think about these issues before 2, today you have articulated
23 very confidently the existence of what you contend to be a
24 checkmate advice of counsel defense here.

25 Accepting, for argument's sake, that that is so, with

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1 all the time that there was had between the complaint and the
2 indictment and then after the indictment, why would you put
3 Mr. Teman through the rigors of going to trial if you thought
4 that there was a winning advice of counsel argument here?

5 One of the reasons I'm a little surprised at this turn
6 of events is that while it seemed to be clear that there must
7 be a counsel in the picture here, if the advice of counsel
8 defense was as clear as it is, the government has a history of
9 nolle'ing cases when they are persuaded that, unbeknownst to
10 what they thought when they charged it, they were wrong, why
11 not take a whack at that. I don't want to get into plea
12 discussions or anything like that, but that would seem to me,
13 if you're right, would have been a natural course for counsel
14 to at least raise.

15 MR. GELFAND: Your Honor, without obviously getting
16 into any privileged communications between our clients and us,
17 what I can represent is that over the course of this case --
18 and I understand that to some extent there's just a natural
19 evolution of this happening, the government's entire theory of
20 prosecution has consistently changed.

21 And for example -- and I think this will perhaps shed
22 some light on some of the strategic decisions, if you will --
23 as a practical matter, the government initially arrested
24 Mr. Teman literally without looking at -- much less reviewing
25 or knowing -- the existence of the contracts that are at issue.

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1 And they arrested him on a bank fraud allegation on a criminal
2 complaint out of state. That's a fairly unusual set of
3 circumstances. No federal agency involved in the
4 investigation. I'm not saying there's anything improper with
5 that, but I'm just saying it is unusual.

6 When we brought the existence of the contracts to the
7 attention of the U.S. Attorney's Office, the theory of
8 prosecution just kept changing, where it was basically no
9 matter what the defense brings to us, we'll just basically
10 draft a narrative that isn't -- I'm not saying maliciously, but
11 that essentially isn't, You're right, we should have looked at
12 these contracts in advance; we should have understood these
13 contracts in advance.

14 And furthermore, we weren't fully confident that we
15 were intending to proceed on an advice of counsel defense until
16 very recently. And one of the reasons why is because the
17 government announced that they were intending to supersede,
18 which they have the right to do. They ultimately superseded on
19 January 2nd. They told us in broad strokes that there would be
20 additional counts by our fraud counts, etc.

21 At that point we knew there was going to be a new
22 operative charging document. And we didn't even have the
23 charging document and these specific allegations in the
24 indictment, which, of course, would inform the decision of what
25 to raise and when to raise with the prosecutors. To state the

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1 obvious, we need to know what the charges are before any
2 defenses are committed to.

3 That, to be clear, was January 2nd, approximately
4 three weeks ago. And so it's been a moving train. We believe
5 that Mr. Teman obviously has announced to this Court that, you
6 know, he is exercising his right to a trial. And, you know,
7 we've prepared accordingly.

8 THE COURT: Fair enough.

9 I was eager to understand the context for not
10 attempting to get the government to drop the charges. For
11 better or worse, you've explained what the series of events
12 was, and I appreciate it.

13 MR. GELFAND: Thank you, your Honor.

14 THE COURT: All right.

15 Is there anything we need to take up before I see you
16 at 2 o'clock?

17 MR. BHATIA: Nothing.

18 THE COURT: All right.

19 MR. DiRUZZO: Just one thing, your Honor.

20 I assume that we can leave our stuff here in the
21 courtroom; it will be locked.

22 THE COURT: Mr. Smallman?

23 THE DEPUTY CLERK: It won't be locked.

24 THE COURT: It won't be locked. I think it's
25 historically proven a safe place, but I think you'll need a

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1 GateGuard or something to protect it. I can't give you
2 lock-solid assurance, but I think it's pretty safe.

3 MR. DiRUZZO: Okay. Thank you your Honor.

4 THE COURT: Very good. I'll see you at 2 o'clock.

5 Thank you.

6 But, look, do, everybody, issue a spot here. I want
7 to make sure that once we proceed to trial, we don't have
8 unexpected surprises. I want counsel always to know what the
9 ground rules are.

10 See you at 2 o'clock. Thank you.

11 (Luncheon recess)

12 A F T E R N O O N S E S S I O N

13 2:07 P.M.

14 THE COURT: All right.

15 Be seated, counsel. Welcome back.

16 Thank you for gathering this afternoon just to follow
17 up on the colloquy that we began to have about the emergence of
18 advice of counsel as a potential issue in the case.

19 I should note that having reviewed some of the case
20 law during the break, I am reminded that the shorthand locution
21 that we all tend to use in an advice of counsel defense is, in
22 fact, not correct; and as *Scully* makes clear, the proper
23 formulation relates to advice of -- to evidence of advice of
24 counsel as bearing on the government's burden in establishing
25 the intent requirement.

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1 In any event, to the extent that I -- and presumably
2 everybody else here -- slips into using the locution "advice of
3 counsel defense," I will take it as mutually understood that
4 that's just a shorthand, and what we all mean to say,
5 consistent with *Scully*, is advice of counsel as a component of
6 the jury's analysis as to intent.

7 All right. Before we broke, I identified at least
8 three issues that I thought would be worth raising with you.
9 Let me go through the issues I have in my mind -- I've come up
10 with a fourth -- and then see what else you all have.

11 The first issue is whether there is any application by
12 the government or any basis to preclude or limit what the
13 defense can do in opening with respect to advice of counsel.

14 MR. BHATIA: No, your Honor, there's no application
15 from the government at this point to preclude any opening on
16 advice of counsel.

17 THE COURT: Very good.

18 I didn't think there would be, but I wanted to give
19 you the opportunity.

20 MR. BHATIA: Thank you.

21 THE COURT: All right.

22 Defense, is there anything you want to bring to my
23 attention *vis-à-vis* opening statements with respect to this
24 issue? You're not required to do so, but I'm always eager
25 to -- nobody wants to get a sustained objection. If there's

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1 something you feel you need to or would benefit by alerting me
2 to, I'm happy to consider it.

3 MR. DiRUZZO: Sure, your Honor.

4 Just conceptually, I think advice of counsel,
5 self-defense, defense of others, duress, all of those are
6 appropriately made to the jury in opening.

7 THE COURT: You're not going to be making a
8 self-defense --

9 MR. DiRUZZO: No, no, no.

10 THE COURT: I'm sorry.

11 MR. DiRUZZO: But just those -- what we typically
12 think of as reasons why they call it an affirmative defense,
13 why you call it as bearing on the jury's consideration of
14 intent or *mens rea* is appropriately -- appropriate for defense
15 counsel to raise it at opening; and then, you know, it becomes
16 part of the case. But there is nothing that, from my view,
17 precludes a defense counsel from doing that before the jury.

18 THE COURT: And I'm in agreement.

19 I think the case law that I have seen, based on an
20 early peek, does suggest that there are sometimes situations in
21 which there's been a government motion *in limine* and in which
22 one can reliably make a judgment beforehand whether there is a
23 basis or not for such a defense. And in the case in which one
24 could actually get to clarity before the opening, that might
25 have implications. We're not in that case.

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1 Quite to the contrary, defense counsel has proffered
2 that they have evidence that will check all the boxes with
3 respect to an advice of counsel instruction, we'll see. But
4 there's certainly no basis for precluding your referencing it
5 in opening.

6 All right. The second issue involves -- and again,
7 this is entirely conjectural, but I like to plan. One scenario
8 is that there will be sufficient evidence for the jury to find
9 that all the ingredients of an advice of counsel defense are
10 met. If that is the case, *Scully* certainly provides a very
11 useful template for what an advice of counsel instruction might
12 look like.

13 The alternative scenario though involves one where the
14 Court can determine essentially as a matter of law that
15 material facts were not shared with counsel. Again, no reason
16 to assume one way or the other whether that will be true here.
17 But just for the purposes of making sure that the Court is
18 prepared, I am interested in your judgment about what happens
19 if the defense opens, in effect, on advice of counsel, and the
20 evidence then doesn't permit a jury to find all the
21 ingredients, for example, material disclosure, disclosure of
22 all material information to the lawyer are met; or that, for
23 example, the client didn't abide by the lawyer's guidance as to
24 how to proceed in the face of those disclosures.

25 I'd welcome counsel's judgment as to what the

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1 instruction looks like to the Court under that situation.

2 MR. BHATIA: Your Honor, it's something we would have
3 to give more thought to on the wording of an instruction. But
4 we do believe that it is within the Court's discretion to give
5 an instruction to the kind that you referenced before, saying
6 it's not for the jury to consider the advice of counsel, and
7 then elaborate on that. I think there are different ways to
8 give that type of instruction; but we do think it's within the
9 Court's discretion to give that.

10 THE COURT: My memory is that even where an advice of
11 counsel instruction is inappropriate, the conversations with
12 the lawyer, nevertheless, are received and may be considered as
13 they bear on the defendant's intent. The issue is really how
14 to package that for the jury in a situation where there have
15 been noises made about an advice of counsel defense. And I
16 would want to make sure that the jury was well-instructed that
17 that defense doesn't apply.

18 So, look, it's premature to solicit an instruction for
19 a fact pattern that has not been factually triggered, but I
20 want each of you to do your homework on that so that when and
21 if we get there, and there's a scenario under which the trial
22 moves quickly, I immediately get something in writing from you.
23 So both sides are charged with being prepared in the event that
24 we wind up in that place to be able to give me your written
25 guidance.

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1 Yes.

2 MR. GELFAND: And we'll certainly do so, your Honor.

3 Just as, kind of, food for thought, for lack of a
4 better way of putting it, I think that there's a basis to
5 include additional language in a general good-faith
6 instruction, which was submitted by both parties outside of
7 advice of counsel, that would basically draw the jury's
8 attention as to what they can and can't consider.

9 THE COURT: Right. The issue is you are making a --
10 you are going out not on a limb, but you are making a
11 judgment -- you are essentially putting advice of counsel out
12 there in a way that may or may not require some commentary for
13 the Court, if ultimately the evidence doesn't permit that form
14 of a defense. That's a choice. We'll see. And you'll guide
15 Mr. Teman as to how far it makes sense strategically for the
16 defense to go in an opening on this point.

17 My concern is that with you going there, I want to
18 make sure that I am ready to instruct the jury in a way that
19 corrects any misapprehension, if needed. And I agree with you
20 that one forum in which to do that might be under the
21 good-faith header or it might not. But there is a scenario
22 under which I need to say something, and I want you all to be
23 at work on what that would be on that scenario.

24 MR. GELFAND: Absolutely, your Honor.

25 The other thing I just wanted to just offer for the

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1 benefit of the Court and the record is that we have discussed
2 this issue with our client. And I believe that he understands
3 the ramifications of anticipating that we will lay a sufficient
4 evidentiary foundation for an instruction; and that the Court
5 could theoretically conclude otherwise based on what actually
6 happens at trial.

7 THE COURT: The ramifications being what? Without
8 probing into attorney-client communications, if you could
9 proffer what the ramifications, as you refer to them, are, I
10 would welcome that.

11 MR. GELFAND: Yes, your Honor.

12 First of all, that the Court -- that there is -- just
13 to back up 30,000 feet, that there is such a thing as an advice
14 of counsel instruction within the Second Circuit. That the
15 language is obviously subject to the Court, but generally
16 includes pretty well-settled ingredients.

17 That there is a possibility that, first of all, the
18 Court would not give that instruction based on the evidence
19 that actually comes out at trial, regardless of what we
20 anticipate the evidence is going to be. And that in the event
21 that the Court does not give that instruction, there's also
22 certainly a possibility, if not a probability, that the Court
23 would instruct the jury so as not to permit the jury to
24 essentially go down a road that the law doesn't permit them to
25 go down.

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1 THE COURT: And depending on what counsel have said in
2 their opening, there may be a need to be more pointed in
3 instructing them why the advice of counsel defense doesn't
4 apply.

5 MR. GELFAND: Yes, your Honor.

6 THE COURT: I mean, again, we're dealing with
7 possibilities.

8 All right. May I take a moment and just inquire of
9 your client?

10 MR. GELFAND: Yes, your Honor.

11 THE COURT: Mr. Teman, good afternoon.

12 THE DEFENDANT: Good afternoon, your Honor.

13 THE COURT: You've been obviously listening
14 attentively to this. I want to make sure though that you are
15 well-informed, so as in conjunction with your lawyers, to guide
16 how they choose to defend you in their jury addresses in
17 particular.

18 Have you had an opportunity to discuss so far at
19 length with your counsel the pros and cons of anchoring your
20 articulation of the case to the jury at trial heavily on an
21 advice of counsel "defense"?

22 THE DEFENDANT: Yes, your Honor.

23 THE COURT: All right. Very good.

24 And without getting into the detail, have counsel
25 advised you of what, in their judgment, the pros and cons of a

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1 trial defense along those lines would be?

2 THE DEFENDANT: In great detail, your Honor.

3 THE COURT: Okay. Very good. I'm glad to hear it.

4 I don't have anything further to inquire about that.

5 Again, just, counsel, be prepared.

6 I'm not sure, Mr. DiRuzzo, if you're the right one to
7 ask, but I'll turn the floor to you and you let me know.

8 I just want to confirm that the only lawyer relevant
9 to the advice of counsel instruction is, in fact, Mr. Reinitz;
10 there's no other lawyer as to whom this instruction pertains.

11 MR. DiRUZZO: Correct.

12 THE COURT: Okay.

13 Final question for me, and then I'll open the floor if
14 there's anything else worthy of consideration, involves jury
15 selection tomorrow. I don't think the existence of a potential
16 advice of counsel issue in the case changes anything I would
17 say to the venire about the case or any questions I would ask.

18 The description of the case, which I've lightly
19 modified, but not in consequential ways, I don't think is
20 changed by the potential of a "defense" along these lines. I
21 already was going to be asking the jury about, you know,
22 lawyers in their family and friend group and legal knowledge on
23 their part. I don't think it's necessary to start probing
24 further their views generically of lawyers.

25 But since the case has taken this turn, let me just

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1 ask counsel if anyone thinks there's anything I ought to be
2 sensitive to in voir dire, now that we know that this is part
3 of the case?

4 MR. BHATIA: Nothing, your Honor.

5 I think the questions prior remain the same. Maybe
6 the weight and the way we think about them as far as cause
7 challenges might change, but I think the questions should
8 remain the same.

9 THE COURT: Defense?

10 MR. GELFAND: Your Honor, I agree.

11 And the one thing -- and I think this would be
12 included in the Court's voir dire anyway is we had included
13 Ariel Reinitz's name as a name that they --

14 THE COURT: Right.

15 MR. GELFAND: Obviously we just want to make sure no
16 one has been represented by Mr. Reinitz or --

17 THE COURT: Yes. His name will be on the list and
18 I'll leave it at that.

19 He's a New York lawyer, right?

20 MR. GELFAND: He is. He's with a firm called
21 FisherBroyles, which has --

22 THE COURT: Fisher, last name?

23 MR. GELFAND: Broyles, B-R-O-Y-L-E-S.

24 THE COURT: Is that on the list of entities?

25 MR. GELFAND: It is not on the list.

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1 THE COURT: Okay. Then let me add it to the list
2 alphabetically. Fisher, spelled B-R-O-Y-L-E-S?

3 MR. GELFAND: Correct.

4 THE COURT: How big a firm is that? It's not one
5 that's familiar to me.

6 MR. GELFAND: He had said a couple hundred lawyers --

7 THE COURT: Oh, wow.

8 MR. GELFAND: -- based around the country.

9 He was previously -- I don't know if the Court cares
10 about this, he was previously with Lowenstein Sandler.

11 THE COURT: Is that name going to come up?

12 MR. GELFAND: Only if he was going to say, I
13 previously worked here, in a very background way.

14 THE COURT: But he wasn't at Lowenstein when he
15 advised Teman in connection with this case?

16 MR. GELFAND: His relationship with Mr. Teman began
17 when he was at Lowenstein. However, with respect to the very
18 concrete advice relevant to this case, he was at FisherBroyles.

19 THE COURT: Anyone want me to ask about Lowenstein
20 Sandler? It sounds like it will come up only as part of his
21 professional background. Sounds unnecessary.

22 MR. BHATIA: I don't think we need to reference it.

23 MR. GELFAND: I would agree with the Court. I just
24 wanted to raise that.

25 THE COURT: Fine.

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1 Look, then I'll just say the FisherBroyles law firm,
2 just so that they have some idea what type of entity we are
3 talking about.

4 Okay. And I take it there's nothing, defense counsel,
5 you know -- there's nothing about Mr. Reinitz's practice or
6 something that's going to come out that would be
7 attention-getting or the kind of thing that either side would
8 want to know with respect to the jury's reaction to? His
9 practice sounds pretty meat-and-potatoes.

10 MR. DiRUZZO: For example, it's not like he represents
11 Mr. Avenatti or some other famous --

12 THE COURT: Just to choose a random person on the 13th
13 floor of this courthouse.

14 MR. DiRUZZO: Right, right. Something along those
15 lines. He doesn't represent, as far as we're aware, any person
16 of public fame or anything like that that would generate some
17 type of feelings one way or the other from the jury.

18 THE COURT: All right. Very good.

19 All right. So those are all the questions I have for
20 you. And you've got your homework assignment about both the
21 instruction and the instruction in the event the elements
22 aren't met.

23 Let me just go around the horn and, beginning with the
24 government, ask if there's anything else, given all the ferment
25 this morning, that you wanted to raise.

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1 MR. BHATIA: No, your Honor. I think once we get to
2 take a look at the documents, we might have more thoughts to
3 provide; but for right now, we'll take a look and then we'll
4 see where we go from there.

5 THE COURT: Great. Look, I'm happy for you to give
6 more thoughts at that point. Given the preview that
7 Mr. Gelfand gave though, it sounds as if the way in which they
8 intend to establish the elements of advice of counsel relies
9 substantially more on oral testimony than the documents. So
10 the documents may give you some insight, but it sounds like
11 they're really not going to allow you to answer the question
12 whether there will or won't be evidence allowing all the
13 pillars of an advice of counsel instruction to be met.

14 MR. BHATIA: Understood.

15 THE COURT: All right.

16 Defense, anything from you?

17 MR. DiRUZZO: No, your Honor. Although I did want to
18 provide, with my opposing counsel, a flash drive with our first
19 tranche of document production.

20 THE COURT: Great. I'll let you give my copy to my
21 law clerk, and the government's to it.

22 MR. DiRUZZO: Sure.

23 THE COURT: Let me ask, we're going to have the jury
24 come in at 9:30 tomorrow or as soon thereafter as the jury
25 assembly -- jury clerk is able to pull names and bring them

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1 over here. I expect that will be in short order.

2 So the question is does anybody expect -- what is the
3 likelihood that we'll have business to take up tomorrow morning
4 that will last more than a half hour? You are obliged to be
5 here, per my usual practice, at 9. The question is ought you
6 be here earlier?

7 MR. DiRUZZO: Your Honor, from Mr. Teman's behalf, I
8 don't believe that we're going to have much; although, as a
9 matter of full disclosure, we're still -- "we" being the
10 attorneys writ large, still working on some stipulations
11 regarding bank documents and the like.

12 THE COURT: Does it make sense to, just in an excess
13 of caution, have you here at 8:30 tomorrow? And I say that not
14 wanting to punish you, but given that the government is going
15 to be reviewing a bunch of documents into the evening, heaven
16 knows what might get stirred up with that. Once the jury
17 venire is here, we're going to get started with them.

18 I have a little voice here -- not literally -- that is
19 saying to me it's prudent for us to have an extra bit of time
20 together in case something else comes up.

21 MR. DiRUZZO: We have no problem with that, Judge.
22 Half an hour is not going to move the needle.

23 THE COURT: All right. Then why don't we plan on
24 being here at 8:30 in the morning.

25 Counsel, if there's anything of consequence you intend

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1 to raise, if you don't have the time to write the usual
2 letter -- and as an aside, I very much have appreciated the
3 letter-writing I've gotten on each side already. As you can
4 tell, I dig into that immediately and try to resolve things
5 promptly; because my goal is to allow you to be the masters of
6 your cases and to know what my rulings are.

7 If you're unable in the time available to write one of
8 those letters, at least shoot me an email so that my chambers
9 and I, when we get in very early tomorrow morning, have some
10 idea what's coming from each of you. Okay?

11 MR. BHATIA: Understood.

12 THE COURT: All right. Very good.

13 Anything further from the government before we adjourn
14 for the afternoon?

15 Sorry, from the government.

16 MR. DiRUZZO: I'm sorry.

17 (Counsel conferred)

18 MR. BHATIA: Your Honor, earlier when we had met this
19 morning, your Honor had referenced a letter on a few different
20 topics. Were you still looking for a letter on those topics,
21 your Honor? I think one of them was whether notice was
22 required, whether there's discovery to be done on the advice of
23 counsel issue.

24 THE COURT: No, no, I think we're covered on that.

25 My crack staff has run down the law on notice. And

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1 the thrust of it is that while there isn't an affirmative
2 freestanding duty in the federal rules, courts have broad
3 discretion to impose notice and disclosure requirements outside
4 the rules, including with respect to advice of counsel. I
5 could read into the record a number of citations, but I don't
6 think anyone is disagreeing.

7 I think, in effect, what we did today discharged
8 exactly those -- that authority. In effect, with the extra day
9 here and the process I've used at least to help break the
10 logjam with respect to documents, you are now on notice that
11 the defense is coming; you've been given a preview that it is
12 substantially anchored in oral as opposed to substantially
13 written communications; you have a notion of where they are
14 going; and you've got, I think, a full production of documents
15 from the parties to the privilege relationship. We've also
16 confirmed the waiver of the privilege to the full contours of
17 this case.

18 So I think, in practice, I have come to discharge the
19 authority I have here in a way that seems proportionate to the
20 challenge. I don't need any more law from you, unless there's
21 an issue you've spotted.

22 MR. BHATIA: That's good. I just wanted to make sure
23 you weren't waiting for a letter that we didn't file.

24 THE COURT: You're caught up.

25 Okay. Defense, anything from you?

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1 MR. GELFAND: Just two discrete, completely unrelated
2 to this, evidentiary issues I just wanted to make the Court
3 aware of just so that the Court, as requested, is not
4 essentially caught in the middle of testimony without advanced
5 notice.

6 There are two records that originate from government
7 premarked exhibits that I would anticipate they intend to
8 introduce into evidence. One set of records involve
9 "surveillance photos" from various bank cameras.

10 THE COURT: Yes.

11 MR. GELFAND: My understanding is that the government
12 intends to -- the government conceives of these -- and I don't
13 want to speak for the government -- as "business records,"
14 which we don't dispute that they came -- meaning the
15 documents -- from Bank of America. We're not wasting the
16 Court's time on things.

17 There's additional foundation rooted in the case law
18 that has to be set before any photographic evidence is accepted
19 into the record. And if the government intends to introduce
20 that with someone who can't lay that foundation, I just wanted
21 the Court to be aware that we anticipate objections along those
22 lines.

23 THE COURT: One moment.

24 (Pause)

25 THE COURT: So I noticed these as well, the Exhibits

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1 110 through 112. Right?

2 MR. GELFAND: Yes, your Honor.

3 THE COURT: You're not making a 403 argument, which
4 would probably be hard here since it's a picture of a person
5 who looks like your client dressed in unremarkable clothing in
6 an unremarkable setting of a bank. You're laying a foundation
7 for admission as a business record.

8 MR. GELFAND: It's a 901 basic objection, your Honor.
9 It's an authentication objection.

10 THE COURT: Right.

11 MR. GELFAND: The parties have engaged in brief
12 dialogue about this. But I think there's just a fundamental
13 lack of a meeting of the minds as to what's required to
14 introduce this into evidence. And I just wanted to --

15 THE COURT: What, in your view, would be the means of
16 authenticating it?

17 MR. GELFAND: Testimony from a witness who was either
18 present and can say it fairly and accurately depicts what's in
19 the photo, or testimony from someone who's sufficiently
20 familiar with the recording devices.

21 THE COURT: I assume that, in fact, there's nobody who
22 necessarily saw Mr. Teman or anyone else who -- it looks like
23 he's using a machine, right? No? Is he dealing with a human
24 being or using a machine here?

25 MR. GELFAND: There's different photographs. The

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1 beginning -- some originate from ATM machines, some originate
2 from a human interaction, like 111, for example.

3 THE COURT: Right.

4 Let me turn to the government.

5 Government, I take it there's not a live witness who
6 remembers dealing with a person who looks like this on or about
7 the days indicated?

8 MR. BHATIA: No, your Honor.

9 THE COURT: So what's the means by which the photos
10 would be authenticated?

11 MR. BHATIA: The government will seek to introduce
12 these through senior investigator Karen Finocchiaro, who's a
13 Bank of America investigator. She, herself -- I believe she,
14 herself, pulled these photographs from their records. And so I
15 think she'll be able to lay a foundation that these are kept in
16 the ordinary course of Bank of America's business and, sort of,
17 lay the normal business record foundation, which to us seems
18 sufficient to put in the record.

19 THE COURT: In other words, she will be able to
20 testify based on her familiarity with what she does, that the
21 records are created in the ordinary course of Bank of America's
22 business, and they are maintained in the ordinary course, and
23 that she retrieved them from some -- from a storage area, if
24 you will, the place in which they are routinely maintained?

25 MR. BHATIA: That's right.

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1 THE COURT: Let me ask you, Mr. Gelfand, is there some
2 reason conceptually -- we'll see whether or not the witness is
3 up to the challenge of being a business records custodian, but
4 the government has proffered that she is and then, given her
5 job title, it would not be surprising if she were.

6 Is there some reason why conceptually one means of
7 authenticating a record like this isn't as a business record;
8 in other words, there may be others, but why not?

9 MR. GELFAND: Two reasons, your Honor.

10 The first is that we had actually reached out directly
11 to Bank of America asking for the video footage itself. And
12 our understanding from Bank of America -- and I'm
13 paraphrasing -- is that we don't keep that, we don't have that.
14 It's destroyed.

15 THE COURT: These are stills though.

16 MR. GELFAND: These are stills, as I understand it,
17 that were directly taken from video footage.

18 THE COURT: Right.

19 So the witness though presumably will testify that she
20 retrieved these, or at least counsel is representing, from some
21 regularly maintained database. Whether or not it continues to
22 be maintained, at least as of the time it was taken, these
23 apparently still existed.

24 Taking as true what somebody told you, which is that
25 the database that once kept these records doesn't any longer,

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1 what's the relevance there? There are plenty of databases that
2 override, but there are still business record hubs during the
3 period of time before they are overwritten.

4 MR. GELFAND: I think it would turn, your Honor, on
5 what she specifically says about the extent to which these were
6 kept and maintained in the ordinary course of business.

7 THE COURT: Right.

8 MR. GELFAND: It probably states the obvious; it
9 depends on whether she can lay an accurate foundation.

10 THE COURT: Right. I think that's about as far as we
11 can go here.

12 I take it you are not saying to me that, as a concept,
13 something about a security footage like this is out of bounds
14 as a business record. It's just blocking and tackling; it's
15 can she lay the foundation. And if you voir dire her about
16 whether the records still exist and why they don't, that may or
17 may not give you some traction in opposing admission.

18 MR. GELFAND: Correct, your Honor.

19 I just wanted to give the Court a heads-up that this
20 was an issue that might not otherwise be foreseeable.

21 THE COURT: Okay. And you've also now given the
22 government a heads-up. And that's useful, because rather than
23 detaining us, if Ms. Finocchiaro -- if I've mangled the name,
24 don't tell her. But she now -- the government will now see
25 what it can do to make sure that she, in fact, is qualified to

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1 say what the government hopes she -- what she needs to say to
2 get this in and, if not, it won't come in, we'll see. But I'm
3 glad to have the notice; it will save us time in front of the
4 jury.

5 MR. GELFAND: In that regard, your Honor, there's one
6 other --

7 THE COURT: But let me just ask you, do you have any
8 reason to think, Mr. Gelfand, that the analysis will differ as
9 between 110, 111, and 112, or are we likely all in or all out
10 based on authentication?

11 MR. GELFAND: Without knowing what she's going to say,
12 assuming they all come from the same databases and things like
13 that, no I think it would all be --

14 THE COURT: May I ask you, is there a reason why the
15 parties have been unable to stipulate to this? She's
16 testifying anyway, so it may not be a big deal; but it's within
17 the ambit of things that people often stipulate to.

18 MR. GELFAND: Your Honor, we have gone back and forth
19 in terms of proposed written stipulations. We spoke with
20 government counsel just before the Court took the bench, both
21 this morning and this afternoon. We're going to speak again on
22 stipulations. My anticipation is that we can reach
23 stipulations to the majority of bank records.

24 THE COURT: Okay.

25 MR. GELFAND: We don't want to waste anyone's time.

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1 The government doesn't want to waste anyone's name. We
2 appreciate that.

3 THE COURT: And, look, I don't know where this would
4 fit in, but -- and we'll see how much she can say. It isn't
5 obvious to me that there is -- unless it's really disputed that
6 your client is the one who negotiated the checks, maybe it is,
7 it's not obvious to me that this is a big deal.

8 And so, again, your judgment, you're not obliged to
9 stipulate to anything, eight-plus years of doing this and
10 trials in a prior life tell me that juries are not happy about
11 lawyers in either direction fighting about nonevents.

12 So the question is really whether -- while you're at
13 liberty to insist on your rights that they lay every
14 foundation, the question is just whether it's worthwhile,
15 particularly if it turns out to be an unsuccessful effort and
16 the jury is like, Why did we go through that?

17 MR. GELFAND: Yes, your Honor.

18 THE COURT: Your choice, but I'm just saying.

19 MR. GELFAND: I appreciate that.

20 Most juries hate record custodians, not personally,
21 but --

22 THE COURT: We won't tell Ms. Finocchiaro that either.

23 MR. GELFAND: The other exhibit doesn't relate to
24 authenticity. There's exhibits -- I'm trying to find the
25 government's number, the "interview transcription" with --

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1 THE COURT: You're looking for a government exhibit
2 number?

3 MR. GELFAND: Yeah.

4 Your Honor, it's Government Exhibit 126 and 128.

5 THE COURT: Yes, I wondered about these.

6 What are these?

7 MR. GELFAND: Good question.

8 THE COURT: Sorry, what's your application?

9 MR. GELFAND: Our issue, your Honor, is that we are
10 not disputing that these came from the bank; in other words,
11 we're not being crazy. But what appears here is that there are
12 multiple levels of hearsay that would not make it just readily
13 and easily admissible under just a general business --

14 THE COURT: What does this reflect, just a call by
15 somebody affiliated with one of the customer accounts
16 claiming -- disputing a check and a charge?

17 MR. GELFAND: It's unclear who the declarants are. It
18 appears that Ilana Habibian -- we asked the government about
19 this yesterday by phone -- is a bank employee.

20 THE COURT: Right.

21 MR. GELFAND: Then there's reference to Benjamin
22 Soleimani, there's reference to Joseph Soleimani. And it
23 appears to be kind of notes or a transcription of some sort of
24 question and answer.

25 THE COURT: Right.

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1 And is the concern authentication or is the concern
2 that there are statements here that you would not want received
3 for the truth of the matter asserted because they are in the
4 nature of the customer denying permission?

5 Looks like the latter.

6 MR. GELFAND: The latter, your Honor.

7 And to the extent -- this was done with a bank, as
8 opposed to with the government; so I don't think there's any
9 testimonial applications of the confrontation clause.

10 However, it appears that this is basically a way to
11 "back-door" on statements by someone that were actually written
12 down by someone else.

13 THE COURT: Well, there are a couple of questions
14 here. But one is authenticating these records; perhaps they
15 are easily authenticated as a business record or otherwise.

16 But then the issue is there is hearsay here to the
17 extent that the statements are taken for the truth of the
18 matter asserted. The broad point is the customer seems to be
19 alerting the bank to a dispute about a charge.

20 Let me ask the government, by what means will these
21 come in, and for what purpose would they be coming in?

22 MR. BHATIA: Your Honor, we believe that these would
23 come in through a JPMorgan Chase records custodian. They could
24 also come in through -- I think they'd come in as a records
25 custodian.

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1 THE COURT: All right. So who's that? Is that --

2 MR. BHATIA: I think I have the name somewhere in my
3 records, but I don't recall the name right now.

4 THE COURT: But that person would be called as a
5 witness?

6 MR. BHATIA: They would be called as a witness.

7 THE COURT: What are these records? What's the
8 species of records? How do we refer to these?

9 MR. BHATIA: So these records are stored, as I
10 understand it, in the JPMorgan Chase loss system. It's an
11 internal system that they have to record records like these
12 regarding, I think, fraud investigations. But I believe it's
13 like a regularly kept --

14 THE COURT: But it's a regularly kept log of customer
15 calls?

16 MR. BHATIA: In this case it's a customer call, that's
17 right.

18 THE COURT: All right.

19 So let's assume for argument's sake that your witness
20 is able to say, Here at JPMorgan we prepare a typed synopsis of
21 customer calls, and then we regularly maintain them in a
22 database. That gets you through one level of hearsay, that
23 these words were said to JPMorgan Chase. That doesn't get you
24 to the second level of hearsay, which is that what the customer
25 said to JPMorgan Chase can be taken for the truth of the matter

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1 asserted.

2 The customer could have also said that, you know,
3 Mr. Imperatore was the shooter on the grassy knoll; it doesn't
4 come in for the truth of the matter asserted.

5 The point is there's a second layer of hearsay here.
6 What do you propose to do about that?

7 (Counsel conferred)

8 MR. BHATIA: So, your Honor, I think on one hand these
9 are statements -- we believe that these are statements of
10 Joseph Soleimani, one of the witnesses that we expect to call
11 at trial.

12 THE COURT: Still is hearsay if it's for the truth of
13 the matter asserted, unless there's a hearsay exception.

14 MR. BHATIA: So we think that's a prior consistent
15 statement.

16 THE COURT: To rebut a charge of recent fabrication.

17 MR. BHATIA: We believe that that's going to be one of
18 the -- that could be a line of attack regarding this witness.

19 THE COURT: Well, let's see. What's the date -- the
20 Soleimani call appears to be May 2nd, 2019.

21 MR. BHATIA: That's right.

22 THE COURT: And when does he go to the authorities?

23 MR. BHATIA: This is the time when he reported to the
24 bank, at least, that he wanted this to be charged back.

25 THE COURT: Okay. And your theory is that this is a

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1 prior consistent statement to rebut a charge by the defense
2 that Mr. Soleimani, some time after this date -- only after
3 this date developed the theory that he -- that the charges were
4 unauthorized?

5 MR. BHATIA: We believe that it might be argued that
6 Mr. Soleimani is only now saying that he never authorized these
7 checks. And it's not a genuine belief that he wants these --
8 that he wasn't -- that these checks weren't authorized. So we
9 believe that it might be challenged that this is a recent
10 fabrication.

11 THE COURT: But if the defense's view is that all
12 along he's been fabricating it, and that he never authorized
13 it, and that whenever he started to say it, it was a
14 fabrication -- in other words, the idea of the charge -- the
15 exception with respect to prior consistent statements is that
16 there was some motive that developed in between to lie.

17 In this case, though, I'm not sure why that works.
18 The victims are the ones who catalyze the whole case, and they
19 apparently do so with a call like this. So why is it that this
20 is really to rebut a charge of recent fabrication? Is there
21 something that happens in between?

22 MR. BHATIA: So, of course, we aren't exactly sure
23 what the defense's cross-examination and arguments might be.
24 But we also believe that under this rule, under -- I want to
25 pull up the right rule, it's 801(d)(1)(B), it's also

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1 appropriate to rehabilitate a declarant's credibility as a
2 witness when attacked on other grounds.

3 THE COURT: Right. Go ahead.

4 MR. BHATIA: And so we believe that, in particular, if
5 the argument here is that this isn't a genuinely held belief,
6 then it's also relevant that Mr. Soleimani made the same claim
7 on a different date.

8 THE COURT: Why is it important that these statements,
9 as opposed to Mr. Soleimani's testimony, come in for the truth
10 of the matter asserted? They clearly come in for other
11 purposes. They explain the bank's later conduct; they
12 essentially unspool the events in this case. The issue is
13 solely for the truth of the matter asserted. I'm assuming here
14 that a business records foundation comes in for the fact of the
15 complaint by Soleimani. Presumably he's going to testify to
16 the same effect at trial, right?

17 MR. BHATIA: That's right.

18 THE COURT: So why does it matter if his earlier
19 statements to the bank come in for the truth of the matter
20 asserted as opposed to simply to reflect the fact that he first
21 made the claim at a particular date and then that's what caused
22 the bank to act? What difference does it make?

23 MR. BHATIA: I think it might affect the weight given
24 to the evidence by the jury. I think we're entitled to say
25 that he made a true statement before, and he's making a true

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1 statement today that you can credit fully. And I think we're
2 entitled to under 801.

3 THE COURT: One possibility you're offering is
4 801(d)(1)(B)(i). But that requires a recent fabrication or a
5 recent improper influence or motive in so testifying. Again,
6 we'll see whether or not the testimony supplies that.

7 But the defense may simply be all along he was making
8 this up for the oldest motive known to man, he wanted more
9 money. And it's not that there is something recent; it's just
10 that all along he's telling a falsehood that Teman didn't have
11 a right to create or negotiate these checks. It's not that
12 something recent happened, he just -- he doesn't like the deal
13 he struck with Teman and he wants his money back.

14 That's one possibility.

15 I don't know whether you're going to get a recent
16 fabrication claim here as opposed to a wholesale, all along
17 fabrication claim here.

18 The other argument is to rehabilitate the declarant's
19 credibility as a witness when attacked on another ground.

20 What might that ground be that properly triggers this?

21 MR. BHATIA: I think that other ground might be that
22 this is not a generally held belief, which is like what you've
23 referenced earlier, that he doesn't genuinely believe these
24 were unauthorized, but he's welshing on a deal.

25 So I think there his credibility is being attacked as

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1 sort of not giving truthful --

2 THE COURT: On the grounds that he's been saying this
3 all along, in effect.

4 MR. BHATIA: It is rehabilitative to say he's been
5 saying this all along.

6 THE COURT: Or, I guess, the argument would be the
7 fact that he made the statement soon after getting the account
8 statement revealing the deduction or the charge is an indicator
9 that he meant what he said; he reacted quickly.

10 MR. BHATIA: That's right.

11 THE COURT: Defense counsel, for what it's worth, I
12 would think that it does tend to support the witness's
13 credibility to the extent that soon after receiving the account
14 statement with the disputed charge, he reacted to it in the way
15 that one would argue a person who felt that the charge was
16 bogus did.

17 So I'm happy to hear argument at the time, but
18 assuming authentication, I think that latter point supplies a
19 good reason to allow this to come in for the truth. It's not
20 that it's recent fabrication; it's that it is credibility
21 enhancing that he made the statement soon after getting the
22 account statement.

23 MR. GELFAND: Can I just clarify something and perhaps
24 a government proffer would help with this.

25 At first and second reading of this document, it was

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1 unclear to me whether the declarant was Benjamin Soleimani,
2 because there's a thing that says "authentication known
3 customer."

4 THE COURT: Right.

5 MR. GELFAND: And it actually occurs twice. And then
6 it just says, Signer to contact Joseph Soleimani. And then
7 it's unclear who's actually calling, at least from the face of
8 the record.

9 THE COURT: Right.

10 Who is Benjamin Soleimani, government counsel?

11 MR. BHATIA: Benjamin Soleimani and Joseph Soleimani
12 are the two principals of ABJ; they are brothers.

13 THE COURT: Right.

14 MR. BHATIA: We believe though that the declarant in
15 these records -- and this is what I expect the evidence will
16 show -- was Joseph Soleimani.

17 THE COURT: It looks so. Right.

18 MR. GELFAND: Okay.

19 THE COURT: Anything follow from that or just --

20 MR. GELFAND: Obviously if it wasn't Joseph Soleimani,
21 and Benjamin Soleimani is not testifying.

22 THE COURT: Right. Understood.

23 Look, they are both principals of ABJ. The thesis
24 here you are presumably suggesting is that ABJ made this up
25 after the fact. And to the extent that ABJ gets the account

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1 statement and one of its principals calls fraud on it right
2 away is not irrelevant in formulating a judgment about whether
3 ABJ, through whichever principal, genuinely believed it never
4 agreed to this.

5 We'll see if it's authenticated. But my instinct at
6 this point is that it likely does come in for the truth of the
7 matter asserted. We'll see.

8 Appreciate your raising the issue early.

9 MR. GELFAND: Understood.

10 There's one other brief issue.

11 Some of the government's more recent *Jencks* material
12 that's been disclosed in more recent discovery within the last
13 week or so includes statements by witnesses -- in particular,
14 bank-type witnesses, bank investigators, things like that --
15 that these were deemed to be "fraudulent" or fraud. And I
16 would ask that those witnesses not opine in front of the jury
17 that something is or isn't fraud, because ultimately that's
18 what this trial is about.

19 THE COURT: Why isn't the right answer for me to
20 just -- well, what would be the purpose of their saying that
21 government counsel -- in other words, how is that integral to
22 the narrative here?

23 MR. BHATIA: I think it's important to show the steps
24 that different parties took in triggering the chargebacks in
25 question here. We expect that -- as I think I've mentioned, we

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1 expect that one of the defenses might be the victims were just
2 looking out for themselves and were trying to get their money
3 back. In fact, I think it will be shown that they went through
4 a process, and some of those process involves flagging
5 fraudulent activity.

6 THE COURT: Wait a minute.

7 The fact that some munchkin at JPMorgan Chase
8 concludes that something is fraud doesn't make it so. They
9 haven't done a full investigation.

10 Did anyone at JPMorgan Chase, for example, ever look
11 at any of the contracts between a Teman company and a customer?
12 Probably not.

13 MR. BHATIA: They didn't, your Honor.

14 THE COURT: Right.

15 So the real issue is if they use the label "fraud" in
16 the course of their work, the most important thing is that I
17 instruct the jury that whatever label JPMorgan Chase uses must
18 be disregarded by you as simply -- as anything other than
19 simply describing the internal label they put on it. In the
20 end, it is for the jury to determine whether or not the
21 elements of the types of fraud here are established. That's
22 the relevant point.

23 MR. BHATIA: That's right.

24 THE COURT: Defense counsel, the word "fraud" is all
25 over the case. It's going to be in my voir dire. So I'm not

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1 sure it's quite like saying heroin or something.

2 So it seems to me that the fact that the bank made
3 that conclusion, which is presumably derivative of what the
4 customer told them, if anything, it gives you an opportunity --
5 it allows you to say, Did the customer tell you that there was
6 a contract, or whatever your cross would be. But I think the
7 right answer is for you to ask me to give a limiting
8 instruction to the jury that whatever label the bank put on
9 this is of no moment.

10 MR. GELFAND: We appreciate that.

11 We'll propose a limiting instruction.

12 THE COURT: That's fine.

13 I'm certainly prepared to do one with or without
14 particular wording, but I think that's the right call.

15 It's hard, where the bank has a nomenclature for a
16 process like this to -- for me to police their grammar. And
17 sometimes doing that suggests, when the word slips out, that
18 there's actually some importance to it. So it seems to me the
19 defense's interest is better protected by my giving a firm
20 instruction rather than making it look like it's all that
21 radioactive.

22 MR. GELFAND: I think that's fair.

23 Our concern, as I think the Court understands, is that
24 the jury goes back and says, Well, these seasoned bank
25 investigators say this is fraud; it must be bank fraud.

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1 THE COURT: Look, that plays into your defense of a
2 rush to judgment, right?

3 MR. GELFAND: Sure.

4 THE COURT: You're then going to treat the bank as
5 synonymous with the government as having rushed to judgment and
6 not looked at the contract before making a decision. So
7 another way to look at this is an opportunity for you.

8 MR. GELFAND: Understood.

9 THE COURT: All right.

10 Anything further? Go ahead. Yes.

11 MR. DiRUZZO: I have one thing, Judge.

12 In thinking about the privilege issues, would the
13 Court be amenable for the parties submitting protective and a
14 clawback order? Because obviously the privilege issues that
15 we're talking about are going to be waived. But in the
16 production that the government is going to get, there very well
17 could be a straight email. And I don't want unrelated civil
18 litigation --

19 THE COURT: I see.

20 Let me just say this: You want to make sure that in
21 litigating advice of counsel here, you're not waiving any more
22 than is necessary.

23 MR. DiRUZZO: Correct.

24 THE COURT: The parties can negotiate what they want
25 to negotiate. I'm certainly not understanding your waiver with

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1 respect to this case as intending to waive as to any other
2 controversy. But as it relates to potential civil litigation,
3 hypothetically, with the banks or whatnot, it's hard for me to
4 see how there isn't a waiver here that runs to this
5 controversy. So I'm not --

6 MR. DiRUZZO: To be a little more precise, Judge, I'm
7 worried about that Mr. Reinitz is going to divulge an email on
8 unrelated civil litigation that has nothing to do with bank
9 fraud, RCCs --

10 THE COURT: I see. You want to make sure that if
11 there's an overproduction here, you have a right to claw back
12 the document or at least make sure that a production of
13 privileged material on an exogenous subject isn't treated as a
14 waiver.

15 MR. DiRUZZO: Exactly.

16 THE COURT: All right. I'm happy to just announce now
17 that you have the right -- if you act promptly -- to claw back
18 unrelated materials if they are produced in the course of your
19 forthcoming production of attorney-client materials. But, as
20 with all issues with respect to errant productions, fortune
21 favors the well-prepared and the swift, meaning an attempt to
22 claw back a document is more likely to be respected if it's
23 done sooner rather than later.

24 MR. DiRUZZO: Okay. Understood. Thank you, Judge.

25 THE COURT: Does that give you the comfort you need?

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1 MR. DiRUZZO: Yes, it does.

2 THE COURT: Okay. Very good.

3 Anything further from anyone?

4 MR. DiRUZZO: No, Judge.

5 MR. BHATIA: No, your Honor.

6 THE COURT: All right.

7 I'll see you at 8:30.

8 And again, I expect an email, copying the other side,
9 to my chambers if there's anything of any consequence that you
10 intend to raise tomorrow morning.

11 Thank you. See you at 8:30.

12 (Adjourned to January 22, 2020 at 8:30 a.m.)

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